

LEGITIMACY IN INTERNET GOVERNANCE:
MULTISTAKEHOLDERISM AND GLOBAL CONSTITUENT
POWER

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LEGITIMACY IN INTERNET GOVERNANCE: MULTISTAKEHOLDERISM AND GLOBAL CONSTITUENT POWER

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Multistakeholderism has become one of the fundamental principles of internet governance. It is commonly defined as a model of governance that requires the participation of three stakeholder groups - states, the private sector and civil society - “in their respective role.” However, the how, when, and more importantly the why of the stakeholders’ respective involvement have not been satisfactorily spelled out. This uncertainty is unsettling. Multistakeholderism is increasingly used to prevent governments from making decisions that may impact the internet pursuant to intergovernmentalism. A result of this pushback against intergovernmental initiatives in the field of the internet is the rarity of internet-specific international law. If multistakeholderism is to prevent the making of international law, its legitimacy should not remain a mystery. Whether we like it or (increasingly) not, traditional international law’s legitimacy is firmly grounded in state consent. There is no such clear legitimacy story supporting multistakeholderism.

Relying on global constitutionalism, this dissertation addresses this gap. It develops a model for a composite global constituent power, comprised of a state component and a global component, and explains how it may be exercised, whether directly or, under certain conditions, through mediators. The model is then used to assess multistakeholderism. It concludes that the composite global constituent power model legitimizes equal multistakeholderism. In this version of multistakeholderism, states on the one hand, and the private sector and civil society on the other hand, are the mediators of the state component and the global component respectively and are on strictly equal footing.

BIOGRAPHICAL SKETCH

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INTRODUCTION

Once upon a time, there was a Declaration of Independence of Cyberspace.¹ Its author, John Perry Barlow, believed “the global social space we are building to be naturally independent of the tyrannies you [governments] seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.” The advent of the internet meant that the virtual space it had created would be free from any governmental interference and that law would have no application. The governed had not given their consent to government rule.

At first blush, it looks like Barlow’s Declaration might have been nothing more than wishful thinking. Governments have gradually conquered the internet and the principle that “what is illegal offline is illegal online” is widely accepted. Furthermore, a number of laws that specifically target internet activities have been adopted in many countries. But Barlow is not as wrong as might appear. While governments are present at the domestic level, the same cannot be said at the supranational level. Very few instruments of international law have been adopted since the commercialization of the internet in the early 1990’s, suggesting that the spirit of the Declaration of Independence of Cyberspace is well and alive. Given the number of issues that the rapid growth of the

¹ J. P. Barlow, *Declaration of the Independence of the Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/cyberspace-independence> (last visited 23 April 2016).

internet has created, the absence of international law is surprising, to say the least. The emergence of multistakeholderism is to be blamed for this rather successful relegation of traditional international law to a cameo role.

As understood in internet circles, multistakeholderism stands for the involvement of states, the private sector and civil society in the global governance of the internet. Beyond mandating this unlikely combination of decision-makers, multistakeholderism does not mean much. Although it is generally said to be one of the fundamental principles of internet governance, multistakeholderism has not been substantiated. The how, when, and more importantly the why of the stakeholders' respective involvement have not been satisfactorily spelled out. This uncertainty is unsettling. If multistakeholderism is to supplant traditional international law, its legitimacy should not remain a mystery. Whether we like it or (increasingly) not, traditional international law's legitimacy is firmly grounded in state consent. There is no such clear legitimacy story supporting multistakeholderism.

This is not insignificant. It would be a mistake to think that global internet governance is all about code, protocols and other technical issues. Actually, even code and protocols are not just about technology. All the decisions related to the internet, from the highly technical ones to the more obviously policy-oriented ones, have an impact on internet users. This impact may be indirect, hidden to most, but it does not make it any less important. Our enjoyment of certain fundamental freedoms, such as our freedom of

speech, communication and information, depends on these decisions, even when we are offline. The allocation of IP addresses among regions and countries for instance might affect the ability of businesses in a given country to enter into online transactions.² This might in turn affect the domestic economy, which might in turn affect all the individuals residing in that country.

It thus becomes urgent to inquire about the legitimacy of multistakeholderism. A more open-ended way of phrasing the question is to ask who may legitimately consent to global internet governance. The answer to this question will either make or break multistakeholderism. In either case, the global governance of the internet should benefit from greater clarity.

Methodology

My methodology is guided by my choice of theory of international law. The normative puzzle that I aim to solve is essentially about consent in global governance. Who should get to consent to what? I chose constitutionalism as my theory of international law for one of its main values is self-government, and as a result one of its main ingredients is the consent of the governed. In domestic constitutionalism, this value gets implemented via a set of known mechanisms. By contrast, global constitutionalism has underconceptualized this essential function. Thus my research consists in filling the

² L. DENARDIS, *PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE* 156 (2009).

blanks. Filling the blanks requires to understand how different the global context is from the domestic one. Only then can we draw useful analogies with domestic mechanisms that conform to the essence of constitutionalism and adequately address the realities of global governance. The end result is a model or formula for the global constituent power that can be applied to global governance generally and internet governance specifically.

Summary of chapters

Chapter 1 starts by clarifying what is understood throughout this dissertation as the internet. My definition of the internet focuses on the technology, that is to say the protocols that enables data packets to flow along interconnected networks, but also encompasses the infrastructure that supports this technology and the content that it enables. This definition is sufficiently broad to cover all aspects of the internet while being sufficiently precise to allow an accurate description of the internet regulatory system. Indeed, the goal of Chapter 1 is to show that the internet is the object of regulations that come in all shapes and from all sources and observe that among all these forms of regulations, traditional international law is almost non-existent. Chapter 1 continues by explaining that this is due to multistakeholderism, a model of internet governance that rejects the traditional intergovernmental model. While the multistakeholder model is widely accepted and supplants intergovernmentalism in internet governance, the basis for its legitimacy and its exact content remain unclear.

This situation is not tenable and a source of legitimacy must be found for multistakeholderism.

Chapter 2 tells the story of the rise of multistakeholderism, identifying possible ancestors and showing how it has emerged and consolidated in internet governance. This helps understand how we have arrived at the situation described in Chapter 1 - the widely accepted claim that multistakeholderism should govern the intervention of states in global internet governance. We then temporarily move away from internet governance and step into the realm of international law theory.

Chapter 3 explains why I rely on global constitutionalism to address the multistakeholderism puzzle. Constitutionalism focuses on democratic legitimacy and self-government. It does so through the notion of constituent power. When we move to the global level, the democratic promise should similarly revolve around the global constituent power. Identifying who the global constituent power is is a prerequisite to conceiving a legitimate governance model. Could it be that multistakeholderism is an iteration of the global constituent power? Furthermore, internet governance may be seen as going through a constitutionalization process, making global constitutionalism an even better fit.

Chapter 4 provides an overview of the literature on the global constituent power and finds it surprisingly scarce and lacking in several important respects.

Chapter 5 thus attempts to address the gaps identified in Chapter 4 and offers a comprehensive approach to the global constituent power in the form of the composite global constituent power model. The global constituent power consists in both a state component and a global component and the involvement of both in global constitutional dot-making is necessary to ensure democratic legitimacy, both domestically and globally. Because the identity of the constituent power cannot be dissociated from its exercise, I also describe the several ways in which the composite global constituent power may be exercised.

Chapter 6 acknowledges the limits to the composite global constituent power model. The composite global constituent power model fills many but not all the gaps left by the emerging theories of global constituent power. In addition, the composite global constituent power inherits a few as yet unsolved paradoxes from constitutionalism in general and global constitutionalism in particular. Practical challenges also arise in the implementation of the composite global constituent power.

Chapter 7 sees us return to internet governance. Relying on the composite global constituent power model described in Chapter 5, we explain the circumstances under which multistakeholderism may be considered as an iteration of the global constituent power, and thus legitimate according to global constitutionalism. This helps us flesh out multistakeholderism. We then apply this set of recommendations to ICANN and its

recent foray into global constitutional terrain via the new generic top level domain name program.

After summarizing the findings of the dissertation, the conclusion explains how multistakeholderism may be reconciled with traditional international law, allowing us to postpone the latter's time of death until a later day. I finish on a more pessimistic tone, by noting that multistakeholderism only accounts for a subset of global internet governance. The composite global constituent power model does not reach the purely private forms of governance that are far from insignificant.

CHAPTER 1: INTERNATIONAL LAW, A MINOR PLAYER IN A HEAVILY REGULATED INTERNET

Multistakeholderism - understood as the involvement of governments, the private sector and civil society in their respective role - is claiming a preponderant spot in the regulation of the internet, and thus in the regulation of our online lives, though its legitimacy is not well established. In this chapter, we shall start by defining the internet before explaining how the internet has been regulated. We will then show that, out of all forms of regulation, international law has remained at the margin because of multistakeholderism.

Section 1: The internet, a case of multiple identities

Internet seems full of contradictions. It is (almost) everywhere and nowhere. It is here and there, both conspicuous and intangible. It is hard to grasp. At the same time, defining the internet might seem as silly or pointless a task as defining a phone. Don't we all know what it is? Don't many of us use it on a daily basis, having integrated it into our life to such an extent that we are not even aware of it sometimes? Many aspects of our lives³ have migrated online, as the myriad "e-words" and "online this or that" that

³ According to the World Bank, nearly 60% of the world population does not have access to the internet. The World Bank, *Digital Dividends* 7 (2016), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2016/01/13/090224b08405ea05/2_0/Rendered/PDF/World0developm0000digital0dividends.pdf (last visited 8 July 2016). This new dimension of the disparity between developed and developing countries is known as the digital divide.

have emerged in our language have shown. From e-commerce to e-government to online dating, we seem to be living our lives online. The most telling sign however might be when we sometimes no longer specify that we do things online. We work remotely, share pictures or check our mail and it goes without saying that we do so online.

When asked what the internet is, people tend to equate what they do on the internet with what the internet is. However, these are only examples of activities that have been enabled by the internet. This tells us what the internet allows but not what the internet is. Neither should the internet be reduced to the web, as is so often the case. However central to the success of the internet the web, or world wide web, has been, it remains one of many applications supported by the internet. The web is not the internet.

The confusion is understandable. As acknowledged by the Internet Engineering Task Force (“IETF”) itself, the open-membership group that makes many important technical decisions about the internet, “there’s no agreed upon answer that neatly sums up the internet. The internet can be thought about in relation to its common protocols, as a physical collection of routers and circuits, as a set of shared resources, or even as an attitude about interconnecting and intercommunication.”⁴ So what is the internet?

Oftentimes, the internet is defined by drawing analogies with modes of communication, such as television (in that the internet, like the television, is used to broadcast programs)

⁴ E. Kroll et al., *Request for Comments 1462: FYI on "What is the Internet?"*, IETF (1993), <https://www.ietf.org/rfc/rfc1462.txt> (last visited 1 November 2016).

or telephone (with the introduction of online chat systems, and later on, of voice over Internet Protocol, which allows users to make voice calls) regulations. The Council of Europe has suggested that inspiration could also be drawn from “international law relating to certain natural common resources,” in particular water, which, like the internet, is “a global resource requiring global protection using international law.”⁵ However, this comparative exercise faces certain limitations. On the one hand, “an analogy to any particular aspect of the internet may over-simplify the understanding of the Internet.”⁶ Because the internet is complex and permits the provision of different services, combining regulations that each deals with one aspect only of the internet is likely to bring unsatisfying results. On the other hand, “with the increasing convergence of different telecommunication and media services, the traditional differences between the various services are blurring,”⁷ so that the use of analogies is not entirely meaningful. It is better to adopt a stand-alone definition. As we shall see below, several definitions are available that each come with a different philosophy.

A. Internet as cyberspace

The term “cyberspace” comes from sci-fi novelist William Gibson.⁸ The connection between authors and computer scientists marked the early stages of the internet. A lot

⁵ Council of Europe, *Internet Governance and Critical Internet Resources*, 23 (April 2009).

⁶ J. KURBALIJA, AN INTRODUCTION TO INTERNET GOVERNANCE, 24 (6th ed. 2014), https://www.diplomacy.edu/sites/default/files/An%20Introduction%20to%20IG_6th%20edition.pdf (last visited on 23 April 2015).

⁷ *Id.* at 25.

⁸ W. GIBSON, *NEUROMANCER* (1984).

of dreams were poured into this new technology that ignited creatives' imagination. Those dreams centered on the hope for a new world that would play by different rules. Lessig argues that the rise of cyberspace thought coincides with the realization that the world after the fall of the Berlin wall was not to become instantly more free.⁹ Cyberspace thus became the new frontier where freedom, understood as freedom from governmental oppression, was finally to become a reality. The Declaration of Independence of Cyberspace, which is the work of Barlow, the lyricist of the rock band the Grateful Dead, proclaimed adherence to "rough consensus and running code,"¹⁰ which refers to the decentralized self-regulation model that had prevailed over the birth and rise of the internet and made no room for governments in any capacity.

Despite being influenced by technology and the community of computer scientists that created the internet, the proponents of cyberspace often believe that cyberspace is the result of an act of nature. Here again we can quote the Declaration of Independence, which states that cyberspace "is an act of nature and it grows itself through our collective actions."¹¹ This formulation, as ambiguous as it is, seems to indicate that cyberspace has a mind of its own, and that its evolution is organically fed by its participants' actions.

⁹ L. LESSIG, CODE 2.0, 2 (2006).

¹⁰ J. P. Barlow, *Declaration of the Independence of the Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/cyberspace-independence> (last visited 23 April 2016).

¹¹ *Id.*

The notion of cyberspace has made its way into the legal literature in a less poetic fashion. It has actually been a source of debate in the early internet scholarship. Post and Johnson are among those who have embraced the notion of cyberspace. They see the internet as a place with borders made up of the screens and passwords that allow us to move from the real to the virtual world.¹² In the words of Post and Johnson, “[t]here is a “placeness” to Cyberspace because the messages accessed there are persistent and accessible to many people. You know when you are “there.” No one accidentally strays across the border into Cyberspace.”¹³ Embracing cyberspace ultimately leads Post and Johnson to reject the applicability of domestic law and support self-regulation. “[O]nline phenomena” are physically disconnected from the various states that make up the real world and cannot legitimately be reached by their law.

On the contrary, the opponents to cyberspace would insist that “[t]he Internet is not, as many suggest, a separate place removed from our world. Like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction.”¹⁴ The emphasis is on the “people in real space”, those persons, whether real or legal, that enter into internet transactions. The way that law reaches those

¹² D. R. Johnson and D. G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996).

¹³ *Id.* at 1379.

¹⁴ J. L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEG., 475, 476 (1998).

persons is in no way novel. Goldsmith concedes that sometimes, the persons actually entering into the transactions cannot be easily identified or located but in that case, Goldsmith would target internet intermediaries for enforcement purposes – you can always find someone that can be identified and reached.

Though the term cyberspace has now fallen into disuse, it deserves our attention. Cyberspace might seem like the fruit of an overly vivid imagination, and the Declaration of Independence, in all its grandiloquence, does little to dissipate this feeling. The internet is not an act of nature but the result of man-created code that is implemented over tangible objects, such as wires or computers. It also is not a new world that is out of states' reach. People do not disappear into cyberspace, though some may be hard to locate.

Nevertheless, a valuable takeaway from cyberspace is the emphasis that it places on freedom from governments and playing by different rules. We may disagree with the underlying reasons – the idea that the internet created a new place – but it is an expression of a user-maker ethos that has influenced the evolution of the internet and was prevalent among those who made the internet.

B. Internet as a communications system

Communication may be defined as the “transmission or exchange of information, knowledge, or ideas.”¹⁵ Because the internet moves packets of data from a source to a recipient, everything it accomplishes consists in exchanging information. Thus the internet is a remarkable means of communication. By this definition, purchasing a book is communication since placing the order and paying for it requires that data packets be sent to and from the buyer. Everything that we do on the internet may be analyzed as communication.

However, this is not what people think of generally when they define the internet as a communication platform. They primarily think of the content that is generated on the internet: the countless websites, weblogs, podcasts, emails, chats, videos and more. That is what they mean when they say “oh I’ll check this on the internet.” It corresponds to the reality that most internet users (at least the vast majority of us who are neither geeks nor working for an internet access provider for instance) experience in their use of the internet.

While this understanding of the internet is predominant, it does not reflect the original intent of those who first thought of ARPANET, the predecessor to the internet. They had in mind resource-sharing more than anything else. In those days that far predate

¹⁵ OXFORD ENGLISH DICTIONARY ONLINE (2016).

the emergence of personal computers, computers with significant computing capacity were rare. ARPA, a government agency within the defense department, was supporting most of the computer science research in the US. To try and optimize their spending, they wanted to facilitate the sharing of those supercomputers. The need to make resource-sharing easier was one of the main motivators behind the creation of ARPANET. It is only over time that communication became more central, first with the introduction of emails, the possibilities to share files, and later with the emergence of personal computers and the web (among others). Abbate talks of an unforeseen shift in the identity of the network from a computing system to a communications system.¹⁶

A problem with this approach is that it gives the impression that most of the issues related to the internet are related to content. This definition tends to occult all other issues, which receive comparatively less attention. Content is indeed important and the free speech issues it raises – mostly defining limits to free speech in the name of copyright, national security, and privacy - are equally important. The internet has given the means for many people to exercise their right to speak, exchange information and offered them countless possibilities to learn or simply entertain themselves.

The point is not to discount the tremendously positive contributions of the internet to people's ability to create and consume content – or the negative ones as well (the

¹⁶ J. ABBATE, INVENTING THE INTERNET 109 (1999).

flourishing of conspiracy theories, the ease with which one may publish and access hate speech, for instance). Rather the point is to stress the fact that all this content will only happen if the internet is here to stay and evolves in a certain direction. Indeed, the content is not only affected by laws and regulations that directly target content, but also by the features of the technology that support content, as I shall explain below.

The definition of the internet as a communication tool deservedly acknowledges the phenomenal change that the internet has brought to communications. However, it is reducing the internet to a subset of all online activities that are enabled by the internet and merges the medium with the content that circulates on the medium. Such a narrow view of the internet makes little sense as it ignores the critical nature of the technology and the infrastructure that implements it to whatever happens to content and users. A more technology-aware definition is needed.

C. Internet as an ensemble of layers

In computer scientists' circles, the internet is often presented as a group of layers, the number of which varying according to the person speaking. There would be an application layer, an internet layer and so on. The idea of slicing up the technology that makes up the internet, i.e. code or protocols, was introduced to make development of the set of internet protocols easier. By defining clearly which functions each layer was to accomplish and setting rules governing interactions between layers, the layer model made it possible for developers to focus on one layer without worrying about the whole

system, prevented redundancies that would have made the system unnecessarily complex and meant that the protocols could be developed in a decentralized manner.¹⁷ Building on the layer model idea, scholars such as Benkler¹⁸ and Lessig¹⁹ have offered a layered definition of the internet. They have grouped together all the protocols under the term “logical layer” and added two additional layers: a physical layer, that consists in the wires, cables, airwaves, computers and other technologies implementing the protocols within the logical layer. The logical layer would thus cover “the necessary software components to carry, store and deliver content”²⁰ and the content layer that sits on top of the logical layer would cover “all material stored, transmitted and accessed using the software tools”²¹ of the logical layer.

In the layer definition, the logical layer is the starting point. It is in the strictest sense what the internet is. Indeed, internet is short for internetworking. Therefore, we can say that the internet consists in a set of protocols that enables computer networks to connect, regardless of the type of networks. Let us go back in time and explain a bit more what the logical layer consists of.

¹⁷ *Id.* at 51.

¹⁸ Y. Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Common and User Access*, 52 FED. COMM. L. J. 561, 568 (2000).

¹⁹ L. LESSIG, *THE FUTURE OF IDEAS* 23 (2001).

²⁰ A. MURRAY, *THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT* 44 (2007).

²¹ *Id.* at 44.

Computer networks were already all the rage in the 60's. In the US, the Defense Advanced Research Projects Agency²² (or "DARPA"), the agency within the Defense Department that funds eclectic research and development programs in scientific fields relevant to the military, was a major supporter of computer science. The internet was first conceived in the early 1970's as a way to connect the three computer networks that had been built under the stewardship of DARPA. Those three networks were ARPANET, SATNET, a packet satellite network, and PRNET, a packet-radio network. It made sense to connect them so that resources could be shared more broadly among users of the three networks. However, they presented technical incompatibilities²³ that made it impossible to simply merge them. Something more was needed. Cerf and Kahn, two researchers connected to DARPA, came up with an internetworking protocol that enabled the connections of networks.²⁴ The internet was born.

Among the protocols that make up the internet, one in particular stands out. It is TCP/IP. IP is a protocol that routes packets of data from one computer to the other, while TCP is a protocol that divides data into data packets of a predefined size and then reassemble them in the proper order at their destination. There existed alternatives to

²² The name of this agency changed a few times since it began funding internet-related research. It changed from ARPA, to DARPA, back to ARPA and later on DARPA since the 1970's. I shall be using its current name, DARPA, in this dissertation.

²³ J. ABBATE, *INVENTING THE INTERNET* 122 (1999).

²⁴ *Id.* at 123. Cerf and Kahn benefited from the input of an international group of computer network experts. They created the International Network Working Group, which included foreign network researchers and telecom carriers, among others.

this set of protocols. The most serious contenders were those elaborated by an association of telecom carriers within the International Telecommunications Union (“ITU”), a United Nations agency, and the International Standard Association, which has a broader membership that includes not only telecom carriers, but also computer makers. Each of those protocols, far from being neutral, represented certain interests, economic policies and philosophies.²⁵ For instance, telecom carriers wanted to replicate the telephony model. This would have meant three things: replicating national borders, with one public network in each country that would have interconnected with foreign networks at the border; control of the network by the telecom carriers, private networks remaining the exception rather than the rule; and a more circumscribed role played by the end user.

However, the TCP/IP won the war for a variety of reasons, most notably a significant head start, TCP/IP being a refinement of NCP, the protocol supporting ARPANET, one of the first and largest computer networks in the world. The TCP/IP protocols are also designed to be flexible, so that they can accommodate heterogeneity, both in terms of computer types and network types. The personal computer revolution in the late 70’s also played a significant role in the success of TCP/IP. It lifted a hurdle that could otherwise have compromised the success of the TCP/IP protocol, which locates intelligence at the end-user level as opposed to network level and thus requires more

²⁵ *Id.* at 161-179.

than a basic terminal. In addition, the system created by TCP/IP is easily scalable, as it does not overload the network itself with a plethora of complex tasks, but shifts as much as possible of its burden to the end-user. It is interesting to note that those characteristics that made the internet so successful were not all planned. The internet was to some extent an accidental success.

The TCP/IP protocol has shaped the internet and given it its most distinctive and unique feature: decentralization. It is often referred to as the end-to-end argument.²⁶ According to Lessig, the end-to-end argument is the core of the internet.²⁷ The end-to-end principle is another way of describing the fact that the network does the least amount of work possible with the more complex tasks being left for computers – at the “end” of the network – to accomplish, such as reassembling the packets of data to form a message or check for errors. The network is often said to be “dumb,” with all the intelligence being located at the end. This is so because the network is assumed to be unreliable and needs to be kept relatively simple so as to be replaced easily. Here we see the military roots of the internetworking project. No part of the network should be so essential as to threaten the whole if under attack. This architecture thus offers more latitude, if not freedom, to users who are invited to take on a more active role. They can do whatever they want with the network. As Berners-Lee, the inventor of the world

²⁶ J. H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANS. COMPUT. SYST., 277, 278 (1984).

²⁷ L. LESSIG, CODE 2.0 44 (2006).

wide web puts it, ““There's a freedom about the Internet: As long as we accept the rules of sending packets around, we can send packets containing anything to anywhere.”²⁸

The end-to-end argument is what allowed Zuckerberg to launch Facebook without having to ask for anyone's permission.²⁹ Nothing needed to change at the level of the network before this new service was launched. It all happened at the end. It is as open as possible so as not to presume, and unknowingly restrict, future innovations. An example is the web, which had not been thought of by the engineers and researchers initially in charge of creating the internet. It was several years later that Berners-Lee came up with it, completely changing the landscape of the internet in a way that had not been foreseen. Says an engineer who had participated in the elaboration of TCP/IP,

we wanted to make sure that we didn't somehow build in a feature of the underlying network technology ... that would restrict our using some new underlying transport technology that turned out to be good in the future... That was really the key to why we picked this very, very simple thing called the Internet protocol.³⁰

Keeping the network bare has also meant that the network itself does not know of borders. There is no border on the internet, understood in its technological sense. It does not even make sense to talk about borders. The internet is a technology that

²⁸ T. BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND THE ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* 208 (2000).

²⁹ That is, from a technological point of view. From a legal point of view, his launch raised a series of questions, including privacy. Compare with the telephone network, for which innovation at the edge was not exactly welcome. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

³⁰ Reed, a graduate student who participated in the conception of TCP/IP at MIT, as quoted in L. LESSIG, *THE FUTURE OF IDEAS* 35 (2001).

connects networks and is available in theory regardless of borders. The borders are materialized at the level of the physical infrastructure and at the content level, but not at the logical layer.

We have just seen that at the center of the layered model is the logical layer. This is how it all started and *stricto sensu*, the internet is the logical layer. However, the protocols in the logical layer would mean nothing without the physical layer. They would remain a neat idea presented in a paper at a conference. The physical layer supports the technology and gives life to it. The physical and logical layers go hand in hand. On the other hand, the content layer is the output of the logical and physical layers. The content layer is the *raison d'être* of the logical layer. The unpredictability of the content, its wide variety and diversity are the consequence of the openness of the logical layer combined with the openness (or lack thereof) of the physical layer. Thus the three layers can be grouped together in a broader understanding of the internet. As we shall see below in Section 2, everything is connected. Each layer impacts the other two.

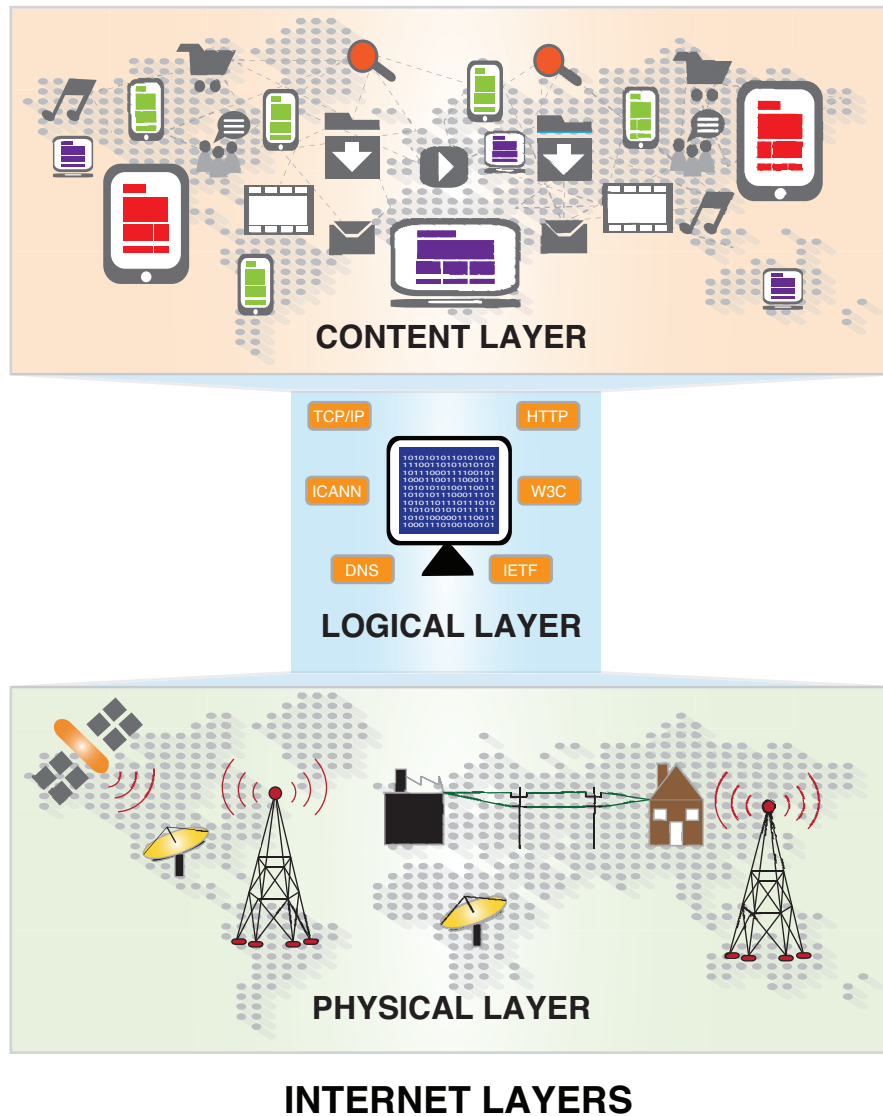


Figure 1: Internet as an ensemble of layers

Adopting the layered definition leads to a greater clarity in the analysis. Each layer, as we shall see in Section 2, is regulated differently, according to its own specificities. The layered definition reflects the multiple faces of the internet – whether we are talking about protocols, the router in our apartment, the email we have just sent, or the newspaper we read online – while at the same time providing a framework for a more

refined analysis according to the specificities of each layer. The internet is not a monolith, contrary to what the cyberspace definition would suggest. Neither is it synonymous with self-generating communication.

As the debate between Post and Johnson on the one hand, and Goldsmith on the other hand shows, how we understand the internet has a direct impact on how we approach the issue of its governance. It is easier to argue for a complete overhaul of governance if we believe that a new world has been created. On the other hand, if we believe the internet is just another communications system, the applicability of existing regimes governing telephony, for instance, should be welcome. Likewise, if we believe that freedom is a value that should govern the internet, the solutions offered will be different depending on whether you focus only on the content layer or whether you expand your view so as to include the logical and physical layers as well. In the following section, we shall go into more details about the regulability and modes of regulation of each layer of the internet.

Section 2: The regulation of the internet

As the linguistic proximity suggests, governance and government are related. Governance would be a form of governing that involves non-state actors and depending on the case, governments as well. Regulation may also be seen as a form of governing though it is often perceived as a very specific form of governing. Indeed, regulation usually refers to rules that are made by governments, pursuant to a grant of

power by law or in some countries, directly by the constitution itself. Nevertheless, for the purpose of this section, we do not need to distinguish between regulation in this narrow sense and legislation. We will use the term “law” as encompassing both regulation in the narrow sense and legislation, as those rules made by a branch of government. The purpose is indeed to paint a comprehensive picture of all the forces that influence the evolution of the internet and in particular highlight those that involve governments. Thus regulation will be understood in this dissertation as synonymous with governance.

A. Many modes of regulation

Lessig, for instance, explains that the internet is subject to four types of regulations:

1. Law, or a form of constraint established by public authorities and enforced by the legal system;
2. Social norms, which are elaborated and enforced by a community;
3. The market imposes constraints by setting a price for goods and services; and
4. Code, created by the technical community and which is self-enforced.³¹

The table below provides examples of each form of regulation for each layer of the internet.

³¹ L. LESSIG, CODE 2.0 340-345 (2006).

Table 1: Examples of layer-specific regulation

		Physical layer	Logical layer	Content layer
Social norms		N/A	Consensus based decision-making, participation in own name at IETF.	Online copyright infringement is acceptable. ³²
Market		Price of internet access, quality of service	N/A	Price of service (whether free, whether supported by ads, whether data monetized by service provider for instance).
Law	Nat'l	Common carrier regime, intermediary liability, access to internet as a public service.	California law applies to ICANN	privacy, copyright, national security, defamation, freedom of speech.
	Int'l	Law of the sea applies to submarine cables; space law applies to satellites, airwaves.	Trademark law applicable to domain names.	Human rights law, in particular freedom of speech and freedom of information.
Code		Deep packet inspection.	End-to-end argument built into TPC/IP; IPv6 transition.	Privacy settings offered by social media; no anonymity rule on Facebook; search algorithm.

As we can see, the internet is heavily regulated. The cumulative weight of these forms of regulation is felt by the end user. Indeed, the content layer is the most subject to regulation since it is subject not only to regulation that directly targets content (such as

³² D. B. Levin, *Note, Building Social Norms on the Internet*, 4 YALE J. L. & TECH., 132 (2002).

libel law, copyright law, or the privacy settings of social media, for instance) but also to regulation targeting the physical layer and the logical layer that indirectly but definitely impact – whether positively or negatively - content. Thus the content layer feels the compound effect of the regulation at each layer. For instance, if an internet access provider engages in content discrimination by relying on deep packet inspection, its users will be prevented from, or at least discouraged from, consuming certain content.

Of course, regulation is not always synonymous with decreased freedom. For instance, the logical layer is mostly about creating possibilities and opening doors, rather than closing them. As we explained above, a choice for openness was built in the original set of protocols. The IETF, who is one of the main technical communities in charge of developing code for the internet, said it clearly:

The Internet isn't value-neutral, and neither is the IETF. We want the Internet to be useful for communities that share our commitment to openness and fairness. We embrace technical concepts such as decentralized control, edge-user empowerment and sharing of resources, because those concepts resonate with the core values of the IETF community. These concepts have little to do with the technology that's possible, and much to do with the technology that we choose to create.³³

These modes of regulation mostly operate regardless of borders. Markets, social norms and code are forms of regulation that are not border-sensitive. Code is made up of a universal language that applies regardless of geography. It is a global regulator par

³³ H. Alvestrand, *Request for Comments 3935, A mission statement for the IETF*, IETF (2004), <https://www.ietf.org/rfc/rfc3935.txt> (last visited 8 July 2016).

excellence and that is particularly true of TCP/IP since its function is to connect networks irrespective of their characteristics. TCP/IP turns a blind eye to the location of these networks. Social norms are created among communities. While language, and thus indirectly citizenship, may play a role in forging the bond that is required to build a community, it is likely that communities will not exactly match state borders. For one thing, English being a dominant language on the internet, many people whose native language is not English are used to reading, writing, listening or buying in English. In addition, it takes efforts to exclude people from joining a community on the internet – passwords, requirement to sign-up, among others. As for markets, the private sector is sometimes forced to circumscribe its operations to users from specific countries (financial services for instance, or Yahoo! that was ordered to prevent French users from accessing auctions sites selling Nazi memorabilia³⁴). Sometimes, it may require them to create country-specific websites to comply with local laws. However, when that is the case, the service is still the same so that the companies can really be considered to be global.

Only law has a territorial anchor. Many domestic laws are applicable to the internet. To overcome some of the difficulties faced by traditional law enforcement (anonymity for instance), governments often will target the many internet companies that provide services to end-users, for instance social media platforms, and make them carry some

³⁴ LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr., T.G.I. Paris, May 22, 2000.

of the burden of compliance. At the supranational level, some international law is relevant to the internet. For instance, freedom of speech. But as I shall explain below in Section 3 and 4, there has not been much internet-specific international law-making.

B. Many actors involved

As Table 1 above suggests, there is a wide variety of actors involved in the regulation of the internet.

Physical Layer: governments, the private sector

As end-users, our understanding of the physical layer often boils down to our relationship with our access provider. However, the physical layer involves a much broader range of private actors, and sometimes public actors as well, depending on how much of the infrastructure is owned by the private sector and how much is government-owned. In the US, for instance, the physical layer is mostly privately owned by telecom and cable companies. These companies' policies and contracts thus make up the bulk of the regulation at this level, within certain boundaries set by the government. A recent example of such a boundary would be the Federal Communications Commission ruling that has imposed common carrier obligations on broadband internet access providers.³⁵

A notable exception to the private sector-dominated regulation, however, is airwaves necessary for wireless connections. The wireless spectrum is a public resource that is

³⁵ Federal Communications Commission, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Red. 5601 (adopted 26 February 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (last visited 5 November 2016).

regulated by the government, which grants licenses to private operators and thus has greater control over how they operate their business.

The list of actors involved at the physical layer level includes access providers, network operators (telecom companies, large content providers or content delivery networks) and internet exchange points. Some of these actors are directly in contact with the end-users. This is the case of access providers. Whatever they decide, be it prices, terms and conditions, or content discrimination, will directly impact end-users. Often, however, the impact on end-users is indirect and harder to even uncover.

An example is interconnection. Interconnection is a topic that has largely remained under the radar and is not regulated, whether at the domestic level or at the supranational level, although it is of great importance. As mentioned in Section 1, the internet is a network of networks. To send data to or receive data from other networks, there must be interconnections between the networks. There are two ways to interconnect: either bilaterally, in which case two network operators agree to exchange traffic, or to let traffic from one flow through the other, whether against a fee or not (this is called peering); or through an internet exchange point (“IXP”), basically a large room in a building in which several networks meet to exchange data. IXPs are unevenly distributed throughout the world. For instance, 61% of African countries do not have IXPs.³⁶ As a result, data might be sent as far as Europe to be exchanged before making

³⁶ L. DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* 125 (2014).

its way back to a recipient located in the same country but connected to a different network. This translates in higher costs and lower speed and quality of transmission for end-users. It also decreases redundancy and thus reliability. Some are calling for regulation, particularly international regulation by the ITU. This was the object of a proposal by the European Telecommunications Network Operators at the ITU's World Conference on International Telecommunications in Dubai in 2012. The proposal, which was not adopted, advocated for ITU oversight of interconnection and the introduction of the "sending party network pays" principle to compensation for interconnection. This principle, which applies to international phone calls, would have meant that content providers would have to pay every time an internet user wishes to see content. That would change the whole logic of the internet and would have had profound effects.

Just like IXPs, peering also raises issues. Two network providers, Cogent and Sprint, had entered into a peering agreement. Sprint argued that Cogent had failed to meet its end of the bargain, and suspended all interconnections with Cogent, leaving customers of both networks unable to send or receive data from the other. This for instance affected the federal court system, which for a few days, had trouble communicating with major law firms that tended to be connected to the other network.³⁷

³⁷ *Id.* at 128-129.

The companies involved at the physical layer level have often acquired an international dimension, out of necessity (multiplying interconnections all over the world so as to ensure great quality of service) and to expand their business. If you look at the map of the network of major telecom companies, you will see that their network usually spans several continents.³⁸ Interconnections all over the world ensure that customers will have fast and high quality access to the whole internet. Network operators thus will enter into peering agreements in several jurisdictions, just like Sprint and Cogent had done.³⁹ They might also participate in international consortia to build and operate submarine internet cables. The often international nature of their activities means that their power to regulate goes beyond domestic borders.

Logical layer: the technical community

The logical layer follows a very different pattern from the physical layer. The code that makes up all the internet protocols is non proprietary. It is a commons. For instance, the specifications of TCP/IP were made public.⁴⁰ Another well-known example is the code underlying the web. CERN, the European Organization for Nuclear Research

³⁸ See e.g. Sprint, *Global IP Map*, https://www.sprint.net/images/network_maps/full/Global-Global-IP.png (last visited 4 August 2016).

³⁹ L. DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* 128 (2014).

⁴⁰ Information Sciences Institute, *RFC 791: Internet Protocol* (1981), IETF, <https://www.ietf.org/rfc/rfc791.txt> last visited 5 November 2016) and Information Sciences Institute, *RFC 793: Transmission Control Protocol* (1981), IETF, <https://www.ietf.org/rfc/rfc793.txt> (last visited 5 November 2016).

where Berners-Lee worked at the time he created the web, released the protocols into the public domain.⁴¹ Nobody has an exclusive claim over any of it.

Nonetheless, decisions must be made with respect to these protocols, regarding updates and improvements for instance, and several organizations have evolved that are generally accepted as the legitimate decision-makers - the standards they create are adopted by all internet users. Note that these organizations' authority has no legal basis. At most they have received an official but subtle nod in the outcome documents of the 2003-2005 UN World Summit on the Information Society ("WSIS").⁴² These organizations' functioning is unusual. First of all, these organizations are open to anyone. The only express requirement is that people participate in their own name and not on behalf of a government or company. In practice, however, there are obstacles to participation. You need both a technical background to participate meaningfully in discussions and money to fund trips to meetings (though remote attendance is possible). Second of all, decisions are consensus-based, or to use the famous phrase made by "rough consensus."⁴³ Thirdly, transparency reins over the decision-making process. For instance, all documents are made available on the internet, including

⁴¹ See W. Hoogland & H. Weber, *Statement Concerning CERN W3 Software Release into the Public Domain*, CERN (30 April 1993), <https://tenyears-www.web.cern.ch/tenyears-www/Declaration/Page2.html> (last visited on 1 August 2016).

⁴² World Summit on the Information Society, *Tunis Agenda for the Information Society*, ¶¶ 35(b) and 36, (WSIS-05/TUNIS/DOC/6 (rev. 1)) (2005), <http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.pdf> (last visited 5 November 2016).

⁴³ H. Alvestrand, *Request for Comments 3935, A mission statement for the IETF*, IETF (2004), <https://www.ietf.org/rfc/rfc3935.txt> (last visited 8 July 2016).

minutes of meetings and attendance lists.⁴⁴ The IETF and the World Wide Web Consortium (“W3C”) are prominent examples. The IETF defines itself as “a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet.”⁴⁵ The IETF is a descendant of a long line of groups of experts that presided over the destiny of ARPANET, and then the internet. W3C deals specifically with the protocols supporting the web.

At the logical layer level, ICANN stands apart. I shall explain more about ICANN in Chapter 7 but for now it is sufficient to say that ICANN is a private not-for-profit based in California. It is in charge of the internet’s unique identifiers, including IP addresses and their alphanumerical translations, domain names. ICANN’s jurisdiction over internet’s unique identifiers is backed up by legal instruments, namely contracts with the US government – though some have argued that such contracts breach US law.⁴⁶ In any case, the US government is about to renounce its oversight powers and remove itself completely from ICANN, raising once again the question of its status.⁴⁷ Unlike other organizations that agree on standards that are later on voluntarily adopted by

⁴⁴ *Id.*

⁴⁵ IETF, *About page*, <https://www.ietf.org/about/> (last visited 1 August 2016).

⁴⁶ See generally M. A. Froomkin, *Wrong turn in cyberspace: using ICANN to route around the APA and the Constitution*, 50 DUKE L. J. 17 (2000).

⁴⁷ L. E. Strickling, *Updates on the IANA Transition*, NATIONAL TELECOMMUNICATIONS AND INFORMATION AGENCY (16 August 2016), <https://www.ntia.doc.gov/blog/2016/update-iana-transition> (last visited on 25 August 2016).

internet actors, ICANN's decisions, which are made by its board of directors on the basis of advice provided by institutionalized communities representing affected parties, are mandatory. Until now,⁴⁸ the decision-making process is structured so that input from the general public and affected parties is mostly channeled through the institutionalized communities and is limited to the drafting stage.⁴⁹

Content layer: internet users, the private sector, governments

The situation at the level of the content layer is very diverse. Social norms undoubtedly play an important role within the myriad communities of internet users that have been created. The rapid growth of social media has encouraged the creation of multiple and sometimes tight-knit communities, which naturally leads to the emergence of social norms.

Governments regulate content both directly and indirectly, by targeting internet companies that provide services and goods on the internet. There is a body of international and regional law applicable to the content layer. Human rights are particularly relevant. Human rights require that governments ensure that businesses within their jurisdiction do not perpetrate human rights violations. As a result, the private sector is indirectly under the obligation to comply with human rights. In

⁴⁸ As we shall see below in Chapter 7, Section 2, procedures within ICANN will change as of 1 October 2016.

⁴⁹ ICANN, *Bylaws*, Section 1 and Articles 8-9 (11 February 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last visited on 4 November 2016).

addition, the private sector is encouraged, through the corporate governance movement, to go beyond those minimal obligations and become promoters of human rights. The UN's Global Compact is "a call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals."⁵⁰ In the field of internet governance, a few companies, along with civil society organizations and academics, have gotten together to create the Global Network Initiative ("GNI"). The GNI has devised a list of principles that are compliant with human rights and tools to help companies implement them. Among other things, member companies agree to independent audits assessing their compliance with the principles.⁵¹ At the regional level, we can point to several instruments adopted by the European Union, like the regulations on conflict of laws arising out of online transactions,⁵² or the e-Commerce Directive⁵³ (in particular its provisions exempting intermediaries from liability for content originating from third parties as long as they remain passive). Occasionally, governments have also engaged in indirect regulation of content through code, for

⁵⁰ UN Global Compact, *Who We Are*, <https://www.unglobalcompact.org/what-is-gc> (last visited on 25 august 2016).

⁵¹ Global Network Initiative, *Accountability, Policy and Learning Framework* (2015), <https://globalnetworkinitiative.org/sites/default/files/Accountability%20Learning%20and%20Policy%20Framework%20-%202015.pdf> (last visited on 25 August 2016).

⁵² See e.g. Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6.

⁵³ Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6.

instance by trying to force phone manufacturers to program backdoors into the software of mobile phones.⁵⁴

The private sector is also a major regulator because of the scope of some internet companies, spanning several continents and counting millions of users. The private sector regulates both through the market and through code, very often across borders as many companies have an international reach.

Let us cite Facebook's stance against anonymity for instance that, given its current 1,18 billion daily users,⁵⁵ has a spectacular impact worldwide.⁵⁶ Google is being threatened to be fined by the European Commission for tweaking its search algorithm so it favors its own services over competitors'.⁵⁷ Uber, or Amazon have also show how these global companies modify behaviors, sometimes testing domestic law in many countries around the world. Concerns over the power of these companies have led some to push for more regulation, including by extending the domestic public utility regime to them as

⁵⁴ See e.g. T. Timm, *The Government Wants Tech Companies to Give Them a Backdoor to Your Electronic Life*, THE GUARDIAN (17 OCTOBER 2014),

<https://www.theguardian.com/commentisfree/2014/oct/17/government-internet-backdoor-surveillance-fbi> (last visited on 5 November 2016).

⁵⁵ Facebook, *Company Info*. (September 2016), <http://newsroom.fb.com/company-info/> (last visited on 1 November 2016).

⁵⁶ Facebook's policy is that "users provide their real names and information, and we need your help to keep it that way." Facebook, *Statement of Rights and Responsibilities*, <https://www.facebook.com/legal/terms> (last visited 5 August 2016).

⁵⁷ C. Williams, *Google faces record-breaking fine for web search monopoly abuse*, THE TELEGRAPH (14 MAY 2016), <http://www.telegraph.co.uk/business/2016/05/14/google-faces-record-breaking-fine-for-web-search-monopoly-abuse/> (last visited on 5 August 2016).

antitrust laws seem unable to tackle this new form of power. This is the case in the US for instance.⁵⁸

Section 3: Traditional international law at the margin

The last two sections have shown the scope and diversity of the modes of regulating the internet. Largely absent is international law. This is all the more surprising that internet would seem a fitting topic for international law. Cross-borders effects, common challenges irrespective of borders, transnational actors falling between the cracks of domestic law... all the ingredients for making new international law are there. Despite those seemingly favorable conditions for the expansion of international law, it has been confined to the margins.

Here we are talking about two kinds of margin:

- a) a temporal margin: the few examples of traditional international law related to the internet date back to the early days of the commercialization of the internet; and
- b) a substantive margin: The scope of these instruments is limited. They either simply confirm that existing international law does apply to internet phenomena or else address very narrow issues, for instance the definition of some cybercrimes.

⁵⁸ K. S. Rahman, *Curbing the new corporate power*, BOSTON REVIEW (4 May 2015), <https://bostonreview.net/forum/k-sabeel-rahman-curbing-new-corporate-power> (last visited on 1 August 2016).

An example of these rare traditional international law instruments are the deceptively named “internet treaties” that were adopted by the members states of the World Intellectual Property Organization (“WIPO”) in 1996. Contrary to what their ambitious name might suggest, the goal was only to dissipate doubts as to whether existing agreements applied to the internet. The Council of Europe’s Convention on Cybercrime of 2001 now counts 49 parties, including non-European states like the US, Canada, Australia or Japan. The Convention defines new internet-related crimes, such as illegal access, interception or interference with “computer data,” or the infringement of copyright or child pornography using computer systems. It also introduces mechanisms for international cooperation in this field.

Of course, this is not to say that pre-existing international law may not apply to the internet. Members states of the World Trade Organization have been debating whether the provisions of the General Agreement on Trade of Services on basic telecommunications services should apply to the internet. In addition, it is no longer doubted that international human rights do apply online. However, the point is that new international law that would specifically target the internet is not being made.

[Section 4: Multistakeholderism as a shield against international law](#)

In the previous sections, we have explained how and by whom the internet is regulated. We have also observed that international law does not feature prominently in the

regulation of internet. In this section, I will highlight the reason why international law has so far remained at the margin in internet matters: multistakeholderism.

Though multistakeholderism could easily be applied broadly, to any decision affecting the internet, it has been used only under very specific circumstances. Multistakeholderism, it is claimed, should apply whenever a state or group of states tries and claims jurisdiction over internet issues – with a few exceptions. The function of multistakeholderism is basically to replace or prevent intergovernmentalism.

This quote from the ASIL Conference in 2015 is informative.

There are no overarching international agreements on the subject [the internet]. Our panel today will touch on the absence of such international frameworks and some of the many areas where that raises questions. This does not necessarily imply that binding international agreements are the solution. The near life-and-death experience with the Internet Telecom Union (ITU) last year certainly convinced a lot of people that such negotiations are dangerous-and we are not yet out of the ITU woods yet!.”⁵⁹

This shows several things: it confirms the near absence of international law that specifically addresses the internet and shows that this comes as a surprise, at least to the legal community. It also highlights that despite a certain degree of ignorance (ITU stands for International Telecommunications Union) of internet governance matters,

⁵⁹ G. N. Horlick et al., *Can International Law Keep Up with the Internet?*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2014), <http://search.proquest.com.proxy.library.cornell.edu/docview/1677184394?accountid=10267> (last visited on 5 November 2016).

there is a clear rejection of intergovernmentalism, the reasons of which are not immediately apparent.

I shall describe multistakeholderism in greater details in the next chapter, but for now, let us simply rely on the usual definition of multistakeholderism: “the involvement of governments, the private sector and civil society, in their respective roles.”⁶⁰ While this definition would seem to indicate that multistakeholderism can be applied against any internet stakeholder – be it governments, the private sector or civil society – it is clear that it has so far been used to keep governments and intergovernmental mechanisms at bay.

The 2012 World Conference on International Telecommunications (“WCIT”) convened by the ITU in 2012, which is referred to in the above quote from ASIL, was a spectacular display of the forces at play. The goal of the WCIT was to update the international telecommunications regulations (“ITRs”), described as “the binding global treaty designed to facilitate international interconnection and interoperability of information and communication services, as well as ensuring their efficiency and widespread public usefulness and availability.”⁶¹ Up until then, the ITRs, which had last been updated in 1988, only incidentally covered the internet to the extent that the

⁶⁰ World Summit on the Information Society, *Tunis Agenda for the Information Society*, ¶34 (WSIS-05/TUNIS/DOC/6 (rev. 1)) (2005), <http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.pdf> (last visited 5 November 2016).

⁶¹ ITU, *Conference Overview*, <http://www.itu.int/en/wcit-12/Pages/overview.aspx> (last visited 8 August 2016).

internet relies on existing telecom infrastructure. In 2006, ITU's member states agreed to revise the ITRs so that the ITU could continue playing a central role in the regulation of global telecommunications despite "advances in technology."⁶² However, before it even started, the WCIT turned into a highly controversial conference. There was disagreement among member states on whether the negotiations, which were intergovernmental in nature, should cover the internet or not. Some proposals were clearly aimed at the internet, like ETNO's, the European telecom operators' association, controversial proposal for including a 'sending party network pays' principle in the ITRs, or Russia's bid for an ITU oversight of ICANN, while other proposals were more ambiguous and resulted in heated debates on interpretation. The WCIT was seen as an attempt by the ITU to "takeover" the internet, by bringing it within the scope of the ITRs. It was further claimed that the ITU, with its intergovernmental procedures, was not the right forum in which to make any decision about internet governance. On the other side, some states, as well as members of the private sector, viewed intergovernmentalism favorably, sometimes as a way of counterbalancing the US' perceived hegemony over internet governance and, in other cases, as a way to gain more control over the internet.

⁶² ITU, Resolution 146 (Antalya, 2006), *Review of the International Telecommunication Regulations*, <http://www.itu.int/ITU-T/itr-eg/files/resolution146.pdf> (last visited 8 August 2016).

Hamadoun Toure, then the director of the ITU, proclaimed ITU's commitment to multistakeholderism as the mode of decision-making at the Conference's opening speech.⁶³ Toure insisted that "[t]he Member State delegations include representatives of all stakeholders." But that was not enough. There were many public expressions of protests. Note for instance a letter signed by several prominent civil society organizations and members of the private sector opposing ITU's initiative. It said

Further, the ITU maintains a relatively closed, non-transparent decision-making process in which only governments are allowed full participation. In contrast, the Internet has flourished under an open, decentralized model of governance, where groups representing business, the technical community, and Internet users as well as governments focus on different issues in a variety of forums. In keeping with the World Summit on Information Society commitments, we believe that such open, inclusive processes are necessary to ensure that policies and technical standards for the global Internet preserve the medium's decentralized and open nature and protect the human rights of its users.⁶⁴

The causality is established between the successful evolution of the internet and the governance model, described as multistakeholder. This intimate connection that is drawn between the success of the internet and multistakeholderism is made time and again. Assistant Secretary of Commerce for Communications and Information Strickling expressed the same idea when he said

⁶³ H. Toure, *Opening of the WCIT-12* (3 December 2012), INTERNATIONAL TELECOMMUNICATION UNION, [HTTP://www.itu.int/en/wcit-12Pages/speech-toure.aspx](http://www.itu.int/en/wcit-12Pages/speech-toure.aspx) (last visited on 8 August 2016).

⁶⁴ Center for Democracy and Technology et al., *Sign-on Letter Opposing ITU Authority Over the Internet* (5 September 2012), <https://cdt.org/insight/sign-on-letter-opposing-itu-authority-over-the-internet/> (last visited on 8 August 2016).

My first point is that the Internet we enjoy today—this marvelous engine of economic growth and innovation—did not develop by happenstance. It emerged as the hard work of multistakeholder organizations such as the Internet Society, the Internet Engineering Task Force and the World Wide Web Consortium. These organizations have played a major role in designing and operating the Internet we know today.

These multistakeholder processes have succeeded by their very nature of openness and inclusiveness. They are most capable of attacking issues with the speed and flexibility required in this rapidly changing environment. By engaging all interested parties, the open multistakeholder process encourages much broader and more creative problem solving. These attributes of speed, flexibility, and decentralized problem solving stand in stark contrast to a more traditional, top-down regulatory model characterized by rigid processes, political capture by incumbents, and in so many cases, impasse or stalemate.⁶⁵

Going back to the WCIT, the conference was full of drama and in the end, no consensus could be reached among the member states. The revised amendments, from which most references to internet had been removed, were adopted by a vote, a failure for an institution where decisions are usually adopted by consensus. 55 states, including the US, all the European states, a few South American countries, Australia and Canada refused to sign the ITRs. Russia, China, Brazil, South Africa count among the 89 signatories. As a way to pacify relations within the ITU, the member states adopted in 2014 a resolution defining and limiting ITU's role in internet governance.⁶⁶ A victory

⁶⁵ L. E. Strickling, *Opening Remarks at the Internet Governance Forum*, NATIONAL TELECOMMUNICATIONS AND INFORMATION AGENCY (27 September 2011), <http://www.ntia.doc.gov/headlines/2011/opening-session-remarks-assistant-secretary-strickling-internet-governance-forum> (last visited on 8 august 2016).

⁶⁶ ITU, Resolution 102 (Rev. Busan, 2014), *ITU's role with regard to international public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses*, INTERNATIONAL TELECOMMUNICATION UNION, <http://www.itu.int/ITU-T/itreg/files/resolution146.pdf> (last visited 8 August 2016).

for the proponents of multistakeholderism, the resolutions circumscribe ITU's role in internet governance and largely remove the specter of a UN takeover. In particular, it is now agreed that the ITU's role does not extend to the content or logical layers. ITU will also revise its procedures so as to increase transparency and provide opportunities for public participation. The WCIT in Dubai had been criticized for its secretiveness. A website called WCITleaks had even been created to make public the various proposals for internet-related amendments to the ITRs. As I explained in Section 1, the ITU had unsuccessfully tried to develop and impose an alternative to TCP/IP, as if that original failure forecasted the ITU's tumultuous relationship with the internet.

In this Chapter, we have seen that among the many definitions of the internet, the layered approach, which sees the internet as an ensemble of three layers - the physical, logical and content layers - allows a better grasp of the myriad ways the internet, and thus end-users, are being regulated. Traditional international law accounts for very little of this regulation as multistakeholderism is being promoted as the legitimate way of governing the internet. While multistakeholderism is broadly defined as the involvement of governments, private sector and civil society in their respective role, in reality, it has been used as a shield against intergovernmentalism only, so much so that we can distinguish between two subtypes of multistakeholderism:

- public multistakeholderism that applies whenever governments would act according to the traditional intergovernmental model, in which the private sector and civil society are at best mere observers; and
- private multistakeholderism, pursuant to which the private sector includes other non-state stakeholders but is under no obligation to include governments in any capacity.

In this dissertation, I shall focus on public multistakeholderism as it represents a new attack on traditional international law, despite being an unidentified governance object. In the remainder of this dissertation, multistakeholderism will be understood to refer to the public multistakeholderism category only. The next chapter will be focused on the history of multistakeholderism.

CHAPTER 2: MULTISTAKEHOLDERISM, A RECENT SUCCESS RESTING ON UNCERTAIN GROUNDS

Despite being a mouthful, or possibly because it is a mouthful, multistakeholderism is one of internet scholars' favorite words. Multistakeholderism is presented and widely accepted as the key to the legitimacy of internet governance, one of its most fundamental principles. It is also often presented as a novel and revolutionary model of governance that is indigenous to the internet. At the same time, it must be remarked that nobody agrees on what multistakeholderism really means. This Chapter goes in depth about multistakeholderism, identifying possible ancestors and showing how it has emerged and consolidated in internet governance. This helps understand how the claim that multistakeholderism should constrain the role of states in global internet governance became widely accepted despite resting on shaky foundations.

Section 1: Multistakeholderism, a short story

A. The roots of multistakeholderism

In this section, we are exploring possible ancestors of multistakeholderism.

Tripartism: same idea, other name?

The International Labor Organization (“ILO”) has implemented since its creation in 1919 a very unique internal governance structure: tripartism. Tripartism may be defined in the case of the ILO as “the process by which workers, employers and governments

contribute to the setting of workplace standards and the protection of workers' rights worldwide.”⁶⁷ The underlying belief is that “voluntary interaction and dialogue among representatives of the various parties is vital for social and economic stability and progress while being consonant with democratic ideals.”⁶⁸ All ILO institutions are structured in a similar way. Each member state is represented by two governmental delegates, an employer delegate and a worker delegate. Within the ILO, worker and employer delegates enjoy the same rights, including voting rights, as the governmental delegates.

The adoption of tripartism by the ILO can be explained by the context of its creation at the end of the First World War. The impact of the war on the ILO cannot be overstated. After all, the creation of the ILO itself was inscribed in the Treaty of Versailles. The decision to adopt tripartism stemmed partly from the fact that tripartism had already been introduced for the benefit of workers in several Western countries during the First World War because they “needed to keep their armament industries working. To do that they had to cut some fairly extraordinary deals with organized labour.”⁶⁹ Furthermore, the communist revolution made the need to pacify labor relations and improve working conditions even more pressing.

⁶⁷ W. R. Simpson, *The ILO and Tripartism: Some Reflections*, 117 MONTHLY LABOR REV. (1994), 40, 40.

⁶⁸ *Id.*

⁶⁹ G. Ryder, *The international Labour Organization: The next 100 years*, 57 J. Indus. Rel. (2015), 748, 749.

However, it would be a mistake to equate tripartism at the ILO, which to this day remains unique among all international organizations, with multistakeholderism. Without undermining the progress that tripartism may represent in other respects, it remains that tripartism as implemented at the ILO is essentially a state-centered organization. “The statist model continues to dominate the ILO’s operation, as the participation of non-governmental interests (namely, the interests of employers and employees) is channeled through the state.”⁷⁰ This makes sense given the context in which the ILO was created and tripartism first introduced. In 1919, state sovereignty was generally accepted as the central paradigm in international law and to this day, the state has remained the relevant unit of concern. Nongovernmental delegates to the ILO are appointed by their member states, though “in agreement with the industrial organizations (...) most representative of employers or workpeople, as the case may be, in their respective countries.”⁷¹ In addition, states are overrepresented compared to the other two groups.

If tripartism, like multistakeholderism, brings together three predetermined groups in an effort to enhance dialogue, it differs from multistakeholderism in that it does not operate on the same level. Tripartism is a form of representation within the state. It looks at the various interests at play within domestic borders and acknowledges the fact

⁷⁰ Y. Dahan et al., *Shared Responsibility and the International Labour Organization*, 34 MICH. J. INT’L L. (2013), 675, 693.

⁷¹ ILO Constitution, Article 3.5.

that states are not opaque monolith but represent various interests. Those interests however do not transcend national borders. On the other hand, multistakeholderism entertains a different relationship with domestic borders. They are only relevant in the identification of the members of the state group. When it comes to defining the members of the private sector and civil society, they are no longer relevant. Multistakeholderism operates on a global level.

Stakeholder Theory in Corporate Governance

The term “stakeholder” comes from a body of literature devoted to management and business ethics, in particular the literature concerned with explaining the goals of the firm. It appeared for the first time in a memo by the Stanford Research Institute in 1963⁷² and progressively made its way to areas outside of corporate governance - the term “Internet stakeholder” shows up in the Green Paper preparing the privatization of the DNS by the Clinton administration in 1998.⁷³ The stakeholder theory goes against the mainstream view that firms’ exclusive goal is their owners’ wealth maximization. The wealth maximization principle is deeply rooted in corporate law and finds its expression for instance in the fiduciary duties that managers owe shareholders. The

⁷² Some researchers argue that the “essence” of the theory already existed in the 1930’s, when the General Electric Company defined four categories of stakeholders, shareholders, employees, customers and the community. T. VERSTRAETE ET AL., *A BUSINESS MODEL FOR ENTREPRENEURSHIP* (2011), 37. Perhaps not entirely coincidental, the Stanford Research Institute was involved in the development of the ARPANET, the predecessor to the internet.

⁷³ NTIA, *Improvement of Technical Management of Internet Names and Addresses*, Proposed Rule, 15 Fed. Reg. 8825 (20 February 1998).

wealth maximization paradigm relies on strong utilitarian and property rights arguments.

The stakeholder theory, on the other hand, tries to bridge the gap between the owners of a firm and the rest of the world, possibly even including the natural environment, and between business and ethics. It also aims at overcoming the “separation thesis”⁷⁴ that underlies so many discussions in business ethics and results in rigid distinctions (and oppositions) between business decisions and moral decisions. The stakeholder theory expands the circle of those whose interests must be taken into account beyond the owners of the corporation. But exactly who are the stakeholders?

Though stakeholder theory has been around for some time, certain of its aspects are still very much debated. For instance, the identity of the stakeholders is far from settled.⁷⁵ There is a narrow view, which defines stakeholders as all those without which the firm could not exist,⁷⁶ a broad view, which extends stakeholder status so as to include all that can affect or be affected by the firm,⁷⁷ and many views in between.⁷⁸

⁷⁴ R. E. Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUSINESS ETHICS QUARTERLY (1994), 409, 412.

⁷⁵ See e.g., R.K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 THE ACADEMY OF MANAGEMENT REVIEW (1997), 853, 853-854.

⁷⁶ This position was put forth in an internal memo by the Stanford Research Institute, as quoted in R. E. FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984), 31.

⁷⁷ *Id.* at 46.

⁷⁸ See e.g. R. PHILLIPS, *STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS* (2003), 23 and 120-121. See also R.K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 THE ACADEMY OF MANAGEMENT REVIEW (1997), 853, 856-857.

Phillips observes that the question of the identity of the stakeholders is directly related to the question of their legitimacy, and that uncertainties surrounding stakeholder legitimacy result in uncertainties surrounding stakeholder identity.⁷⁹

When it comes to multistakeholderism in internet governance, however, the issue is less about who the stakeholders are. Somehow, as we shall see, the stakeholder categories are not under dispute. Rather, what is disputed is their relative powers or rights. Another fundamental distinction is that stakeholders in stakeholder theory do not argue that they should themselves have decision-making power. They simply ask that their interests be taken into consideration by the firm's managers. On the contrary, stakeholders in internet governance demand to participate in decision-making.

Environmental Protection and the Inclusion of Non-State Actors

Environmental protection is another area in which multistakeholder models of governance were introduced early on. The 1992 'Earth Summit'⁸⁰ convened by the United Nations is said to have been the "beginning of the participatory turn in global environmental governance."⁸¹ There was a strong presence of civil society, not only at the Summit itself, but also at the well-attended parallel Global Forum. Recognizing their importance, the Agenda 21 adopted by heads of states and governments in Rio provided

⁷⁹ R. PHILLIPS, *STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS* (2003), 120.

⁸⁰ This is how the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, 3-14 June 1992 is commonly known.

⁸¹ K. Backstrand, *Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development*, 12 EUR. J. INT'L REL. (2006), 467, 470.

for the creation of 9 stakeholder categories (other than states) called “major groups” that were granted special access to the intergovernmental processes at the United Nations.⁸² These processes have later on been described as multistakeholder.

The trend initiated in Rio has grown stronger, with the creation of public-private partnerships or the sharing of the responsibility for the implementation of sustainable development practices between governments and non-state actors. It is widely accepted that multistakeholder approaches to governance are needed in this field, though implementation is still hotly debated. For instance, some argue that the multistakeholder models are being abused by powerful actors to their own benefit, a criticism that, as we shall see, has also been expressed with respect to multistakeholderism in internet governance.

We should note that this trend towards the inclusion of non-state actors in the 1990’s is not unique to the field of environmental protection. The emergence of “private authority”⁸³ in the later part of the twentieth century has been widely commented. The example of environmental protection seems to show that intergovernmental processes have been somewhat adjusted to accommodate this new reality and make room for NGOs and transnational corporations. With respect to the internet, the movement

⁸² UN Conference on Environment and Development, *Agenda 21*, ¶¶ 38 and 42-45 (3-14 June 1992), <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (last visited on 5 November 2016).

⁸³ See generally R. B. HALL & T. BIERSTEKER, *THE EMERGENCE OF PRIVATE AUTHORITY* (2002).

however is different. It was never within the realm of intergovernmental processes to begin with. The question was more whether it should become integrated in the intergovernmental process or follow a different path. Thus the issues raised are slightly different. It is not just whether states should collaborate with NGOs for instance, but whether states and NGOs, among others, have a role to play and if so, which it is.

If internet governance and the rise of multistakeholderism fit in the broad trend of the emergence of private authority, it displays specific characteristics. Multistakeholderism in internet governance has no immediate predecessor that would have served as a ready-made model to copy-paste onto existing structures. We shall now turn our attention specifically to how multistakeholderism has entered internet governance.

A. The introduction of multistakeholderism in internet governance

Though it is nowadays nearly impossible to discuss internet governance without the term multistakeholderism (or one of its variants) coming up, it has not always been the case. Multistakeholderism made its way into internet governance in two distinct waves, with the practice of multistakeholderism, or at least practices aiming to establish multistakeholderism, predating the use of the word.

The introduction of the idea

The privatization of the management of the domain name system provided the first opportunity for a public debate on internet governance. Until the commercialization of the internet and the remarkably rapid growth of the number of its users in the 1990's,

the governance of the internet had evolved organically, as and when needed, without the involvement of many outside the technical community. Among governments, only the US government, essentially through the Defense Advanced Research Projects Agency and the National Science Foundation, was involved.

Since the very beginning, the domain name system had been the responsibility of Jon Postel, who became over the years a major figure in the internet community through this work but also through his involvement in other aspects of the development of the internet. As the internet and the number of connected computers grew, the management of the DNS could no longer be performed single-handedly by Postel. Staff was hired to work under Postel's supervision. We have come to refer to the work done by this group as the Internet Assigned Numbers Authority function ("IANA").

The US Government decided to privatize the management of the DNS in 1997. As the internet grew and the potential of the internet economy became clearer, domain names gained strategic importance. The informality that had prevailed over the management of the DNS until then became inadequate. Business owners demanded more competition, more transparency and predictability. Foreign governments were growing increasingly dissatisfied with what they saw as the American control of a now global internet. The US government managed to find a broad consensus, embodied in a White Paper mid 1998. This document sets forth the principles that would govern the privatization.

The US government announced it would transfer the management of the DNS to a yet-to-be formed nonprofit corporation to be headquartered in the US, while retaining some oversight powers. The board of this corporation would represent the interests of all internet stakeholders, both geographically - board members also had to be internationally representative – and functionally – all internet stakeholders had to be represented, from the technical community to internet users to the entities involved in DNS management (registrars for instance). The White Paper clearly rejected the possibility of the US government transferring the management of the DNS to an intergovernmental organizations and limited the involvement of governments in general.⁸⁴ It provided that “neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses.”⁸⁵ Instead, legitimacy was built upon representation of the internet community as a whole. The US government left it to the internet community to set up a corporation meeting those requirements. The internet community – possibly proving the absence of a single internet community – failed to gather a consensus and competing projects emerged. The proposal that was chosen, with some reservations, by the US government was none other than the proposal presented by Postel. This corporation was called the Internet Corporation for

⁸⁴ NTIA, *Management of Internet Names and Addresses, Statement of Policy*, 63 Fed. Reg. 31741 (10 June 1998).

⁸⁵ *Id.* at 31744.

Assigned Names and Numbers. ICANN and the US government entered into a memorandum of understanding on November 25, 1998.

If the implementation of the privatization of the management of the domain name system turned out to be hotly debated, there was broad support from the beginning for a governance model that wholly departed from the classical intergovernmental model. The chosen model puts internet stakeholders in the center as a way to legitimize ICANN. The White Paper clearly states that “[t]he organization and its board should derive legitimacy from the participation of key stakeholders.” It is the first official pronouncement in favor of a central role to be played by stakeholders in internet governance.

Three years later, when the UN General Assembly adopted a resolution convening the World Summit on Information Society (“WSIS”), it took for granted the participation of nongovernmental stakeholders in the preparation of the WSIS and in the WSIS itself, though it left the nature of that participation undetermined. It is actually through the WSIS that the word “multistakeholder” first emerged.

The introduction of the word

It seems that the term “multistakeholder”⁸⁶ first made its way into official documents during the WSIS. A foundational moment in the history of internet governance, the WSIS was convened pursuant to a UN General Assembly resolution.⁸⁷ The WSIS occurred in two phases, the first one in Geneva in 2003, followed by a session in Tunis in 2005. The WSIS gathered a large number of participants, including numerous high level governmental officials, and representatives from international organizations, the private sector and civil society. The identity of the participants themselves showed an effort to include all stakeholders, a form of multistakeholderism. The outcome of the summit consisted in a series of documents, the “outcome documents,” which identify areas in which actions must be taken to create a global information society that would reap the benefits that the internet has to offer.

A longtime actor of internet governance guesses that the term multistakeholderism “emerged from civil society participants in the WSIS.”⁸⁸ The word itself made its first

⁸⁶ Here I see multistakeholder model, process or approach as synonymous with multistakeholderism, though some may distinguish. See e.g. A. Doria, Use [and Abuse] of Multistakeholderism in the Internet 115-138, in *THE EVOLUTION OF GLOBAL INTERNET GOVERNANCE* (R. Radu et al. 2013).

⁸⁷ UN, G.A. Res. 56/183 (21 December 2001).

⁸⁸ M. Kummer, *Multistakeholder Cooperation: Reflections on the emergence of a new phraseology in international cooperation*, INTERNET SOCIETY (14 May 2013), www.internet-society.org/blog/2013/05/multistakeholder-cooperation-reflections-emergence-new-phraseology-international (last visited on 26 January 2016).

– modest – official appearance in the outcome documents, specifically in the Geneva Plan of Action.⁸⁹

At the time of the first phase of the WSIS, the wording of choice was “private sector-leadership” to conform to ICANN vocabulary.⁹⁰ The Working Group on Internet Governance (“WGIG”) that was called for by the Geneva Plan of Action⁹¹ and set up by the UN Secretary-General⁹² to work through a specified list of issues in the interim was instrumental in establishing multistakeholderism as a term of art in internet governance. It was used 9 times in its report⁹³ and from there, was introduced in the Tunis Agenda, where it appears 16 times.

Among other things, the WGIG was entrusted the critical task of defining internet governance and “develop(ing) a common understanding of the respective roles and responsibilities of Governments, existing international organizations and other forums, as well as the private sector and civil society in both developing and developed countries.”⁹⁴ While the WGIG’s definition of internet governance made its way into the

⁸⁹ World Summit on the Information Society, *Geneva Plan of Action*, ¶ 8(f) (WSIS-03/GENEVA/DOC/5-E) (2003), https://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf (last visited on 5 November 2016).

⁹⁰ *Supra* note 89.

⁹¹ *Supra* note 90 at 13(b).

⁹² United Nations, Press Release (11 November 2004), www.un.org/press/en/2004/pi1620.doc.htm (last visited on 31 January 2016).

⁹³ World Summit on the Information Society, *Report of the Working Group on Internet Governance* (June 2005), www.wgig.org/docs/WGIGREPORT.pdf (last visited on 31 January 2016).

⁹⁴ World Summit on the Information Society, *Geneva Plan of Action*, ¶ 13(b)(iii) (WSIS-03/GENEVA/DOC/5-E) (2003), https://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf (last visited on 5 November 2016).

Tunis outcome documents, its view on role allocation among the stakeholders did not. The WGIG had described in details the role of each of the three main stakeholders it had identified, namely governments, the private sector and civil society. Instead, shorter and more general language was adopted in Point 31.

Point 31 of the WSIS states that the legitimacy of internet governance is “based on the full participation of all stakeholders, from both developed and developing countries, within their respective roles and responsibilities,”⁹⁵ without defining in many details those respective roles and responsibilities:

- a) Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.
- b) The private sector has had, and should continue to have, an important role in the development of the Internet, both in the technical and economic fields.
- c) Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role.
- d) Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.
- e) International organizations have also had, and should continue to have, an important role in the development of Internet-related technical standards and relevant policies.⁹⁶

⁹⁵ World Summit on the Information Society, *Tunis Agenda for the Information Society*, ¶31 (WSIS-05/TUNIS/DOC/6 (rev. 1)) (2005), <http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.pdf> (last visited 5 November 2016).

⁹⁶ *Id.* at ¶¶35-36.

Point 36 additionally provides that “[w]e recognize the valuable contribution by the academic and technical communities within those stakeholder groups mentioned in paragraph 35 to the evolution, functioning and development of the Internet.”

Interestingly, when discussing multistakeholderism, the definition that comes up most often is not that offered in Point 31, but rather the definition of internet governance at point 34. Shorter, it only requires the involvement of all stakeholders “in their respective roles.”

The context in which the WGIG came up with the definition sheds light on the definition and the allocation of roles. The focus was less on a comprehensive role allocation and more on affirming the equality of all states at a time when there was growing criticism of what was often perceived as US control over the internet. Other governments, as well as the ITU, worked hard to try and change the governance model and assert their role in it. Finally, “[t]he definition assigned an Internet governance role to ‘Governments,’ commensurate with global interest in greater multilateral administration and potentially a unique role for intergovernmental entities such as the United Nations in Internet oversight.”⁹⁷

⁹⁷ M. Raymond et al., *Multistakeholderism: Anatomy of an Inchoate Global Institution*, 7 INT’L THEO. (2015), 572, 587.

Instead of really trying to define each stakeholder's role, the definition essentially accomplishes three things:

- In the context of the dispute over the management of the domain name system, in particular the role of the US, it acknowledges that all governments have an equal role to play and leaves open the door for international organizations to be involved in standard settings.
- It acknowledges that stakeholders, other than governments, have been involved in internet governance in various capacities, and that it should continue to be so.
- It does not grant stakeholder status to the academic and technical communities, which are instead merged into other stakeholder categories.

The WSIS played a key role in establishing multistakeholderism as a governance model for the internet, not only by introducing the terminology but also by acquainting a wide range of actors, governments included, with the practice. La Chapelle argues that the 4-year long process of the WSIS, from the preparation to the first phase in Geneva to the second phase in Tunis, served as training and helped consolidate the governance model. It forced hundreds of diplomats, business people, civil society actors and technical specialists to interact during four years. In that context, governments progressively had to accept the undisputable competence, and therefore legitimacy and utility, of actors from business and civil society who had not only invented but built and managed the now-ubiquitous global Internet at a time when few governments were paying attention.

By the same token, civil society and business actors were forced to recognize that the complex new policy issues raised by the growing use of the Internet could not be addressed without some government involvement.⁹⁸

B. Consolidation phase

After WSIS, multistakeholderism enjoyed a period of expansion culminating in 2011 with the so-called principles hype.

One of the decisions made during the second phase of the WSIS was the creation of the Internet Governance Forum (“IGF”).⁹⁹ The first IGF was held in Athens in 2006 and has since been hosted in a different country every year. The IGF’s initial mandate of 5 years has been extended until 2025.

The contribution of the IGF to the expansion of multistakeholderism in internet governance is indirect. Indeed, the IGF is not a forum for multistakeholder decision-making. Instead, the IGF is a forum for multistakeholder dialogue. To some extent, multistakeholderism starts with the preparation of the IGF. The Multistakeholder Advisory Group (“MAG”), which as its name indicates is comprised of members from each stakeholder group, is in charge of advising the UN Secretary-General regarding

⁹⁸ B. La Chapelle, *Towards Multi-Stakeholder Governance – The Internet Governance Forum as Laboratory* 260-282, 260, in *THE POWER OF IDEAS: INTERNET GOVERNANCE IN A MULTI-STAKEHOLDER ENVIRONMENT* (Wolfgang Kleinwachter ed. 2007).

⁹⁹ World Summit on the Information Society, *Tunis Agenda for the Information Society*, ¶67 (WSIS-05/TUNIS/DOC/6 (rev. 1)) (2005), <http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.pdf> (last visited 5 November 2016).

programming and organization of the IGF. The MAG members are selected by the UN Secretary-General among candidates that are nominated (or nominate themselves) by the general public using an online form. The candidates are chosen so as to make the MAG the most representative of all internet interests and all regions of the world. The number of representatives from each stakeholder is left at the discretion of the UN Secretary-General. The central role played by the UN Secretary-General prior to the IGF undermines somewhat the multistakeholder nature of the preparation of the IGF. The IGF itself takes place over the course of a few days. Several events run in parallel, differing in size and style – more or less formal - providing plenty of opportunities for dialogue. Some of the meetings are organized by IGF participants, rather than by the MAG.

Like WSIS, which La Chapelle argued was good exposure of all stakeholders to multistakeholderism, the IGF contributes to forming new habits and new relationships among stakeholders, far from the intergovernmental processes that those actors may have been used to. From the point of view of content, the IGF contributes to the development and spread of ideas by organizing discussions on a wide range of topics, including multistakeholderism. Though the IGF meets globally only once a year, regional fora have been created to prepare contributions to the global IGF. For instance, at the European level, the European Dialogue on Internet Governance was

set up by the Council of Europe, ICANN, the Internet Society and others to continue the multistakeholder dialogue in between each IGF meeting.

After the IGF took off, multistakeholderism spread to various international organizations. There was at first a few declarations of support for this model of governance. For instance, the OECD committed to a multistakeholder approach in its Declaration for the Future of the Internet Economy¹⁰⁰ and the Council of Europe expressed its support for a “multistakeholder, democratic and transparent governance with the participation of all interested groups in society,”¹⁰¹ making the WSIS definition of internet governance its own.

This was followed by what is commonly referred to as the “internet principles hype,”¹⁰² in which multistakeholderism figures prominently. Kleinwächter coined this catchy phrase to describe those busy months of 2011 when several governments, usually within the framework of an international organization (OECD, Council of Europe, or Group of 8), adopted various sets of guidelines for the governance of the internet (6 drafts, of

¹⁰⁰ OECD, *The Seoul Declaration for the Future of the Internet Economy* (18 June 2008), <http://www.oecd.org/sti/40839436.pdf> (last visited on 12 February 2016).

¹⁰¹ Council of Europe, *First Conference of Ministers Responsible for Media and New Communication Services of 28-29 May 2009, Report by the Secretary-General*, ¶13 (CM (2009)143) (2009), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d089e (last visited 5 November 2016).

¹⁰² W. Kleinwächter, *Internet Principle Hype: How Soft Law is Used to Regulate the Internet* (2011), .NXT, <http://news.dot-nxt.com/2011/07/27/internet-principle-hype-anon> (last visited on 18 July 2013).

which 4 were adopted from May to September 2011).¹⁰³ The negative connotation of the term “hype,” which suggests exaggeration and excessiveness, is not entirely justified.

Table 2: Internet Principles Hype

ENTITY	DOCUMENT	STATUS
Group of 8	Declaration of the Group of 8 in Deauville, on May 26-27, 2011 titled “Un nouvel élan pour la liberté et la démocratie” ¹⁰⁴	Adopted by heads of states and governments on May 26-27, 2011
EU	Draft “Compact for the Internet” presented in June 2011 by Vice-President of European Commission, in charge of digital agenda ¹⁰⁵	Being considered by Vice-President of European Commission, in charge of digital agenda
OECD	Communiqué on Principles for Internet Policy-Making ¹⁰⁶	Adopted on June 28-29, 2011 by OECD members, Egypt and stakeholders, including the Business and Industry Advisory Committee to the OECD (BIAC) and the Internet Technical Community (ITAC)
UN	International Code of Conduct for Information Security submitted by Russia, China, Tajikistan and Uzbekistan to the UN Secretary-General on September 12, 2011 for consideration at the UN General Assembly. ¹⁰⁷	Not adopted.

¹⁰³ This section is adapted from A.C. Jamart, *Internet Freedom and the Constitutionalization of Internet Governance* 57-76, THE EVOLUTION OF GLOBAL INTERNET GOVERNANCE (Roxana Radu et al. ed 2013).

¹⁰⁴ Group of 8, *Un nouvel élan pour la liberté et la démocratie* (26-27 May 2011), http://www.diplomatie.gouv.fr/fr/IMG/pdf/Declaration_G8_Generale_20110527.pdf (last visited on 30 August 2016).

¹⁰⁵ N. Kroes, *I propose a "Compact for the Internet"*, EUROPEAN COMMISSION (28 June 2011), http://ec.europa.eu/archives/commission_2010-2014/kroes/en/blog/i-propose-a-compact-for-the-internet.html (last visited on 30 August 2016).

¹⁰⁶ OECD, *Communiqué on Principles for Internet Policy-Making* (28-29 June 2011), <https://www.oecd.org/internet/ieconomy/49258588.pdf> (last visited on 30 August 2016).

¹⁰⁷ RCTU, *Proposal for an International Code of Conduct for Information Security* (12 September 2011), <http://www.fmprc.gov.cn/eng/wjdt/wshd/t858978.htm> (last visited on 29 August 2016) and Amended Proposal (9 January 2015), <https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf> (last visited on 5 November 2016). Note that the Proposal was amended so as to incorporate comments in 2015. However, its position on multistakeholderism remains unchanged. See Amended Proposal (9 January 2015), <https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf> (last visited on 5 November 2016).

ENTITY	DOCUMENT	STATUS
Council of Europe	Declaration on Internet Governance Principles ¹⁰⁸	Adopted by the Committee of Ministers on September 21, 2011
UN	Proposal for a United Nations Committee for Internet-Related Policies submitted by India, with the support of Brazil and South Africa, to the UN General Assembly on October 26, 2011 ¹⁰⁹	Not adopted

Regardless of the merits of the principles, these various initiatives show a sense of urgency on the part of the drafters and signatories, who are trying to entrench a particular vision of internet governance in the form of principles. Two competing views emerge, one that supports multistakeholderism and one that either rejects or downplays it.

In the latter camp, we find proposals by Russia, China, Tajikistan and Uzbekistan (RCTU) on the one hand and India, Brazil and South Africa (IBSA) on the other hand. Though both their proposals see intergovernmental oversight as the solution to their concerns, they are significantly different in tone and motives. The IBSA proposal is offered in response to a report prepared by the UN Secretary-General on enhanced cooperation among governments on internet-related policy issues. Its starting point is

¹⁰⁸ Council of Europe, *Declaration on Internet Governance Principles* (21 September 2011), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2f6 (last visited on 30 August 2016).

¹⁰⁹ IBSA, *Proposal for a United Nations Committee for Internet-Related Policies* (26 October 2011), http://itforchange.net/sites/default/files/ITfC/india_un_cirp_proposal_20111026.pdf (last visited on 29 August 2016).

that many critical internet-related issues are not adequately addressed because of a lack of a global policy-making mechanism that would be “open, democratic, inclusive and participatory manner, with the participation of all stakeholders.”¹¹⁰ The creation of a UN Committee for Internet-Related Policies (CIRP) would fill this void. CIRP’s members would be states only, though other internet stakeholders would be able to give advice via advisory bodies. The negotiation of treaties on internet policy would be a big part of the CIRP’s tasks. On the contrary, the RCTU’s main concern is information security, understood as states’ right to protect their “information space and critical information infrastructure.”¹¹¹ This is an assertion of states’ sovereignty over the internet. The RCTU proposal, an International Code of Conduct for Information Security, starts by demanding compliance with the UN Charter as well as “universally recognized norms governing international relations, which enshrine, inter alia, respect for the sovereignty, territorial integrity and political independence of all states.”¹¹² The commitment to fundamental rights and freedoms only comes later. The Code also proposes to assist in the creation of a “multilateral, transparent and democratic international management of the internet”¹¹³ without giving more details as to what such mechanism would look like. The adjective “multilateral” seems to refer to

¹¹⁰ *Id.* at 2.

¹¹¹ RCTU, *Proposal for an International Code of Conduct for Information Security*, 4 (12 September 2011), <http://www.fmprc.gov.cn/eng/wjdt/wshd/t858978.htm> (last visited on 29 August 2016) and Amended Proposal (9 January 2015), <https://ccdcoe.org/sites/default/files/documents/UN-150113-CodeOfConduct.pdf> (last visited on 5 November 2016).

¹¹² *Id.* at 4.

¹¹³ *Id.* at 4.

traditional intergovernmental mechanisms, a conclusion that is strengthened by the failure to mention non-state actors – the term “stakeholder” does not appear – other than in connection with their duty to ensure information security.

In the former group, we find mostly Western democracies, with the US leading the charge, though a few non-Western countries, like Egypt, signed on to the OECD principles as observers. In those instruments, the emphasis is on substantive issues, like freedoms and rights and net neutrality and due process. Procedurally, multistakeholderism is professed as a norm, though in practice the principles themselves may not have resulted from a truly multistakeholder process. For instance, despite being involved in the negotiations from the beginning, the Civil Society Information Society Advisory Council to the OECD (CSISAC) ultimately refused to sign the declaration and claimed that governments had imposed their point of view, in particular regarding the balance struck between the protection of intellectual property rights and freedom of speech.¹¹⁴ A similar problem was seen at the eG8, the Group of 8 Summit on the Internet in 2011, which came under fire for not opening up to civil society.¹¹⁵

¹¹⁴ CSISAC, *Civil Society Coalition Declines to Endorse OECD Communiqué on Principles for Internet Policy-Making*, PUBLIC INTEREST ADVOCACY CENTRE (28 June 2011), https://www.piac.ca/wp-content/uploads/2014/11/csisac_press_release_0628011_final_1.pdf (last visited on 7 November 2016).

¹¹⁵ La Quadrature du Net et al., *Civil Society Statement to the eG8 and G8* (24 May 2011), <https://www.laquadrature.net/en/civil-society-statement-to-the-e-g8-and-g8-0> (last visited on 4 November 2016).

The “internet principles hype” may thus be seen as a PR coup, a public declaration of support for multistakeholderism aimed at building multistakeholderism into a pillar of internet governance. However, the term remains undefined, the behavior of the parties involved in the negotiation of the principles does not suggest the existence of a shared understanding of what multistakeholderism entails in practice, and there is a fierce opposition to a reading of multistakeholderism that goes beyond granting an advisory role to non-state actors. Despite being associated with human rights and other progressive notions such as internet freedom, the intrinsic value of multistakeholderism remains undetermined. All that multistakeholderism seems to stand for is opposition to a certain form of intergovernmental control of the internet.

C. Reaffirmation of support in reaction to perceived threats

2012 saw tensions around the topic of multistakeholderism surge again, with the proponents of multistakeholderism accusing the other side of fomenting a “UN internet takeover.” The UN takeover claim first appeared in 2005, during the Tunis phase of WSIS, when the US was fending off the European Union’s attempt to shift oversight of ICANN, the entity in charge of the domain name system, from the US government to a UN body. As Mueller explained, the European initiative was described by its opponents as a UN takeover of the internet.¹¹⁶ The feud finally ended with the US keeping its oversight of ICANN but agreeing to open up discussions on policy to

¹¹⁶ M. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2011), 75.

all governments. As we have seen above, the “UN internet takeover” claim resurfaced at the WCIT in Dubai in December 2012.

A concern often expressed by the anti-treaty is that an international organization with a quasi-universal membership like the United Nations would generate agreements ab minima, on the basis of the lowest common denominator. Any oversight of internet governance by the UN, and more generally by any intergovernmental body, would necessarily result in increased control and decreased freedom of the internet and internet users. As Assistant Secretary Posner declared, reacting to the idea of the United Nations getting involved in internet governance:

We have, I think, a range of anxieties about throwing this issue and many others into the United Nations. We believe in the United Nations; it has a lot of important roles to play. But we have great trepidation that if this became a UN-sponsored initiative, all of the most – all of the governments that have the greatest interest in regulating and controlling content and protecting against dissident speech in their own countries would be very loud voices. So I think we’re looking for alternatives that provide some form of governance but in a broader sense, without the race to the bottom.¹¹⁷

The US Senate and House of Representatives had adopted even before the WCIT a concurrent resolution reaffirming the policy of the US in favor of a multistakeholder model of governance .¹¹⁸

¹¹⁷ M. H. Posner, *Conversations with America: The State Department's Internet Freedom Strategy*, US DEPARTMENT OF STATE (18 February 2011), <http://www.state.gov/j/drl/rls/rm/2011/157089.htm> (last visited on 15 February 2016).

¹¹⁸ A concurrent resolution expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, S. Con. Res. 50, 112th Congress (2012).

Multistakeholderism is a convenient tool to fend off intergovernmental initiatives on internet issues while not undermining intergovernmental processes in other areas. It is admittedly difficult to reject governance models that rely on the UN and equality among states. This is the very model that has been accepted as the legitimate way of conducting international affairs, including by those now rejecting it for internet matters. So multistakeholderism makes a narrow claim: when it comes to the internet, it is more legitimate than top-down intergovernmental mechanisms. Multistakeholderism in particular prevents control of the internet by governments, a concern expressed by Posner above. Though multistakeholderism remains undefined, there is an emerging understanding of what it is not. What it cannot accommodate is top-down intergovernmental mechanisms. The phrase “UN internet takeover” suggests that the internet already belongs to one model and that the involvement of the UN would modify the model. It implies that a particular model, the multistakeholder model, is firmly entrenched. However, multistakeholderism is far from being the only model in current internet governance.¹¹⁹ Actually, the “UN internet takeover” claim begs the question: taking over from whom? This question is never explicitly answered. Maintaining some amount of vagueness discourages possible challenges to the existing system.

¹¹⁹ L. DeNardis et al., *Thinking Clearly about Multistakeholder Governance*, Paper presented at Eight Annual GigaNet Conference (21 October 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354377 (last visited on 5 November 2016).

The campaign against intergovernmental control of internet governance did not decrease in the wake of the summit. In February 2013, the House of Representatives' Energy and Commerce Committee held a hearing with a very explicit title: "Fighting for Internet Freedom: Dubai and Beyond."¹²⁰ Among the witnesses was FCC Commissioner McDowell, who painted a very dire picture of internet governance, conveying that the internet is under serious and imminent threats and that the US is fairly lonely in its fight for internet freedom. The House went on to approve an "internet freedom bill"¹²¹ in May 2013, which declared that the official policy of the US was to support a multistakeholder control of internet governance.¹²² As for the ITU, its member states adopted resolutions in 2014 declaring that the ITU will steer clear of internet governance, except for narrowly defined topics.¹²³

D. The latest test: the IANA transition

The US government's decision in March 2014¹²⁴ to end its residual role in the DNS has been unanimously welcomed by foreign governments, international organizations, civil

¹²⁰ *Fighting for Internet Freedom: Dubai and Beyond* Before the Energy and Commerce Committee of the House of Representatives, 113th Cong. (2013).

¹²¹ To affirm the policy of the United States regarding Internet governance, H.R. 1580, 113th Cong. (2013).

¹²² The bill was sent to the Senate, which however took no further action.

¹²³ ITU, Resolution 102 (Rev. Busan, 2014), *ITU's role with regard to international public policy issues pertaining to the Internet and the management of Internet resources, including domain names and addresses*, INTERNATIONAL TELECOMMUNICATION UNION, <http://www.itu.int/ITU-T/itreg/files/resolution146.pdf> (last visited 8 August 2016).

¹²⁴ NTIA, *NTIA Announces Intent to Transition Key Internet Domain Name Functions* (14 March 2014), <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> (last visited on 15 February 2016).

society and the private sector alike. The US government made it abundantly clear that it would only consider a full transition to an entity that would be truly multistakeholder in nature, and expressly stated that it would “not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.”¹²⁵ It is uncertain whether the cheerful reactions to the NTIA announcement that poured in from all over the world can be construed as support for the termination of the US’ preferred role in the management of the DNS, however symbolic, or a whole-hearted support for multistakeholderism.

Shortly after the US government’s announcement regarding the DNS, the “Global Multi-Stakeholder Meeting on the Future of Internet” (“NETmundial”) was convened at the invitation of the Brazilian Internet Steering Committee (“CGI.br”). The NETmundial gathered representatives of governments, civil society, the private sector, the technical community and academia. The NETmundial produced two documents: the Internet Governance Principles and the Roadmap for the Future Evolution of the Internet Governance Ecosystem.¹²⁶ Among the Principles figures multistakeholderism. The definition does not go much farther than that of the decade-old WSIS, though it specifies that participation of all stakeholders must be “meaningful and accountable” and that the “respective roles and responsibilities of stakeholders should be interpreted

¹²⁵ *Id.*

¹²⁶ NETmundial, *Multistakeholder Statement* (24 April 2014), <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf> (last visited on 14 February 2016).

in a flexible manner with reference to the issue under discussion.” Furthermore, the Roadmap provides that there should be more discussions on the roles of each stakeholder, “including the meaning and application of equal footing.” This shows that there was at a minimum a consensus that equal footing of all stakeholders might be the way forward.

The proposal on the IANA transition developed by ICANN and recently accepted by the NTIA has not gone fully in the direction of equal footing for all stakeholders. As we shall see below in Chapter 7, it operates a revamping of multistakeholder processes within ICANN, with increased power granted to the internet community, including states, but falls short of equal multistakeholderism.

After having reviewed the turbulent history of multistakeholderism, it is useful to provide an overview of what we know, and do not know, about multistakeholderism.

Section 2: Sketching the contours of multistakeholderism

As we have seen, several organizations have set out to implement some form of multistakeholderism but this has not translated into the further substantiation of the term, or the identification of the minimum requirements to be met in order to qualify as multistakeholder. Many, if not most, intergovernmental processes could qualify as multistakeholder if multistakeholderism were to be understood as requiring nothing more than some form of involvement of non-state stakeholders, for instance as observers. This observation of Cammaerts and Padovani in 2006 is still very relevant a

decade later: “Different actors hold very different perspectives as to how stakeholders should be conceived, who is to be included and who is excluded and how their interaction should lead to information exchange, deliberation or decision.”¹²⁷ So is everything multistakeholderism? Do we know it when we see it? What is the essence of multistakeholderism?

Based on the history of multistakeholderism above, we shall attempt to paint a portrait of multistakeholderism in internet governance, highlighting the unknowns.

A. The cast

The WSIS Outcome Documents themselves do not reflect a clear agreement as to the identity of internet stakeholders. In most places, the list of stakeholders includes not only states, the private sector and civil society, but also intergovernmental organizations. As for the technical community and academia, they are not stakeholders in and of themselves but are subsumed under other categories. It is worth noting here that the composition of the WGIG tilted in favor of government officials, including from countries with dubious internet freedom practices like Saudi Arabia or China.¹²⁸ Underrepresented were “large Internet users (e.g. corporations relying on the internet for financial and business transactions and basic operations); private sector companies

¹²⁷ B. Cammaerts et al., *Theoretical Reflections on Multi-Stakeholderism in Global Policy Processes: the WSIS as a Learning Space*, Paper presented at the IAMCR Conference (2006).

¹²⁸ M. Raymond et al., *Multistakeholderism: Anatomy of an Inchoate Global Institution*, 7 INT’L THEO. (2015), 572, 587.

involved in provisioning Internet products or providing infrastructure; or any representatives from the leading standards setting and administrative entities operationally responsible for the security and stability of the Internet.” This might explain the fact that the technical community, which had presided over the birth and development of the internet, was mentioned almost as an afterthought, while governments and international organizations secured a more prominent spot.

However, in one place, namely Point 34 of the Tunis Agenda, the WSIS Outcome Documents clearly express support for a tripartite form of multistakeholderism, that involves governments, the private sector and civil society, “in their respective roles.” As we have seen above in Section 1, this is the part of the WSIS Outcome Documents that has stuck over time. States, the private sector and civil society have become the classic internet stakeholders. International organizations have been completely removed from the multistakeholder formula. International organizations may convene meetings in which the three stakeholders will participate (like the OECD or the Council of Europe for instance) but their role is that of organizers, hosts and facilitators, not of stakeholders.

Though it may seem straightforward, the tripartite definition raises issues. For instance, ICANN’s organigram does not follow the simple states, private sector and civil society

division suggested in the classic definition of multistakeholderism.¹²⁹ Governments, who participate in ICANN through the Governmental Advisory Committee (“GAC”), can give advice to the Board on all ICANN activities and the Board has the duty to give reasons whenever it decides to disregard GAC advice.¹³⁰ This prerogative places the GAC in a privileged position over other stakeholders. The private sector and civil society do not actually make decisions but are involved in developing policies and may offer advice to the Board. In terms of composition, there are different versions of the private sector and civil society depending on the topic. Indeed, ICANN has tried and identified which subset of the private sector and civil society, respectively, may be affected in each area of activity and has institutionalized those subsets and granted them certain prerogatives. For instance, in matters related to generic top level domain names¹³¹ (“gTLDs”), the private sector is represented by the registrars, registries and commercial users subsets, while civil society is represented by the subset that owns at least one domain name. The only time when civil society acts as a whole and not as a subset is when it appoints board members.¹³² This highly sui generis breakdown of stakeholder categories makes sense as it seems somewhat unrealistic to expect each

¹²⁹ I am describing ICANN’s governance under the bylaws as amended on 11 February 2016. The regime introduced once the new bylaws come into force is described in Chapter 7, Section 2.

¹³⁰ ICANN, *Bylaws*, Article XI, Section 2(j) (11 February 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last visited on 4 November 2016).

¹³¹ Top level domain names (“TLDs”) are the part of the domain name that comes after the “.”. There are two types of top level domain names: country code TLDs, such as .fr or .ch, and generic TLDs, such as .com, .edu or .org.

¹³² ICANN, *Bylaws*, Article VI, Section 2(1)(e) (11 February 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last visited on 4 November 2016).

stakeholder category to be animated by the same goals and think alike. But this raises issues. How narrowly or broadly should interests be defined? Here, going back to the origins of the concept of “stakeholder” might not be as helpful as one might hope. Indeed, the management literature is still debating the pros and cons of a narrow vs. broad vs. middle ground definition. If stakeholders are those who can affect or are affected by a certain decision, then the question arises how to define “affected.” Is it directly affected or could a stakeholder be only indirectly affected? Should interests be pre-determined in abstracto or should they be defined as issues arise by inviting all affected parties to join? A related question is the relative power within one category. For instance, registries and registrars are both subcategories of the private sector category. Should each subset be granted the same rights as the other categories that may not have been further divided? Or should all the private sector subsets, for instance, “share” the rights granted to the private sector? ICANN has selected the former, giving equal power to each subset, irrespective of the stakeholder group to which they belong. This has led to the private sector subsets to outnumber the civil society subset.

B. The scenario

Once we know, at least in theory, who the stakeholders are, how to figure out what each does? What is their relationship? Or relying on WSIS’s definition of internet governance, what are their respective roles?

The Tunis Agenda at Point 31 sketches an allocation of roles among stakeholders. The (non)operative word in the definition is the noun “role.” The definition generously grants many actors “a role”, without specifying the type of role, whether it is a role as an observer, a consultative role, a decision-making role, an exclusive or shared role... For instance, it is hard to conceive how the “role” of civil society could be more undetermined. It does not even go in the details of what “internet matters” civil society has been involved in, contrary to what the WGIG had attempted to do.

This allocation essentially relies on a technical/economic vs. policy dichotomy. Policy is the dominion of states while the technical and economic decisions are left to the private sector. As for civil society, it has a role at the “community level.” This latter phrase suggests involvement on the ground, locally, which seems to ignore the existence of internationally organized NGOs with a wholly different agenda.

The policy vs. technical/economic dichotomy is fallacious. For instance, ICANN routinely makes policy decisions of great impact that cannot be seen as exclusively technical. ICANN was initially conceived as a purely technical body. For that reason, it was deemed unnecessary to include any reference to human rights. The NTIA White Paper that outlined the position of the government regarding the transition of the management of the DNS to the private sector, including the creation of the entity that was to become ICANN, proclaimed that “[e]xisting human rights and free speech protections will not be disturbed and, therefore, need not be specifically included in the

core principles for DNS management.”¹³³ Needless to say, this assumption turned out to be wrong. Technical choices always require policy choices to be made. The internet is no exception, as DeNardis showed. Even a relatively obscure and seemingly wholly technical decision such as the choice of the protocol for addressing (IPv6) proved to be highly political and the result of intense political transactions.¹³⁴

As for the rest of the definition, it is an understatement to say that it lacks specificity. This does not deter La Chapelle, who argues that “in their respective roles” does not mean that the stakeholders should be assigned distinct roles.¹³⁵ According to him, the stakeholders are jointly responsible.¹³⁶ His interpretation seems unsupported by the text of the Tunis Agenda, which clearly supports the idea that each stakeholder has a specific area of competence. For La Chapelle, however, a comprehensive approach to internet governance, which would include technical, economic, social and political facets of a given matter early on in the decision-making process, is necessary and requires the involvement of all stakeholders. Likewise, he believes that because of the architecture of the internet, the implementation of decisions requires the participation of various stakeholders. To have all the relevant stakeholders on board would require their prior

¹³³ NTIA, *Management of Internet Names and Addresses, Statement of Policy*, 63 Fed. Reg. 31741 (10 June 1998).

¹³⁴ L. DENARDIS, *PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE* (2009), 188-189.

¹³⁵ B. La Chapelle, *Towards Multi-Stakeholder Governance – The Internet Governance Forum as Laboratory* 260-282, 260, in *THE POWER OF IDEAS: INTERNET GOVERNANCE IN A MULTI-STAKEHOLDER ENVIRONMENT* (W. Kleinwachter ed. 2007).

¹³⁶ *Id.* at 260.

involvement in the decision-making process.¹³⁷ “Defining transparent, non-discriminatory rules to identify ‘relevant’ stakeholders for each issue will be delicate. But the basic principle of multi-stakeholderism is the fundamental right of any actor to participate, in an appropriate manner, in the governance process by addressing issues they are concerned with or impacted by.”¹³⁸ This begs the question: what is an “appropriate manner”? Another set of issues regards the decision-making process. How would decisions be made in a multistakeholder environment? What kind of majority would be required? Or would we need unanimity?

Overall, many features of multistakeholderism remain blurry. Only one thing is becoming clearer over time. Multistakeholderism is irreconcilable with purely intergovernmental decision-making, by which I mean a model of governance in which only governments would have decision-making power. This was the gist of the IBSA’s proposal to set up a CIRP. Decisions would have been made by governments with other stakeholders, namely civil society, the private sector, international organizations and the technical/academic community, involved as mere advisors. This was also what was perceived to be at stake at the WCIT. The reaction was swift and strong. 55 out of the 133 member states – mostly Western democracies led by the US – refused to sign the ITRs, even after they were revised so as not to mention the internet. A coalition of

¹³⁷ *Id.* at 260.

¹³⁸ *Id.* at 261.

NGOs and tech companies joined the opposition. For instance, Google started a petition that has now been signed by almost three million people. It argued that “[a] free and open world depends on a free and open Internet. Governments alone, working behind closed doors, should not direct its future. The billions of people around the globe who use the Internet should have a voice.”¹³⁹ Beyond this feature, which once again, is not universally accepted, it is hard to define multistakeholderism.

C. The genre

Multistakeholderism is not neutral but has been associated with certain values. As we have just seen, one of these values – the prohibition on exclusively intergovernmental decision-making - has been transformed by some into a standard defining what is and what is not multistakeholderism. IBSA’s proposal of setting up a CIRP is interesting in that respect. The goal was to provide a forum for multistakeholderism. But the goal was reached by placing states at the center.

Multistakeholderism has generally been associated with progressive values, notably internet freedom. Internet freedom is a rather elusive notion that combines both a substantive human-rights based content with some procedural principles such as multistakeholderism. It sounds promising. “By promoting a certain governance model as most compatible with widely resonant norms like ‘freedom,’ ‘privacy,’ ‘democracy,’

¹³⁹ Google, *Online Petition Take Action*, (2012), <https://www.google.com/intl/en/takeaction/whats-at-stake/> (last visited 21 February 2016).

‘equality,’ and ‘political self-determination,’ opposition to multistakeholderism becomes synonymous with opposition to those norms and leaves little room for alternative views.”¹⁴⁰ Certain progressive values often associated with multistakeholderism are “openness, inclusiveness and transparency of processes. The fact that everyone can participate in a process and make their voice heard makes the process multistakeholder by nature.” This approach leaves the decision-making out of the picture. It seems that the ultimate decision-making may be left to one stakeholder without undermining the multistakeholder nature of the process if other conditions are met (those conditions being vague).¹⁴¹ Is that right?

To summarize, we do not know:

- Who decides who decides? And why?
- Who decides? And why? How do we overcome democratic legitimacy issues with civil society or the private sector?
- The definition of stakeholder seems to be issue-specific. But how do you define an issue? How do you draw the line?
- What is the relationship among stakeholders? Could there be a hierarchy and if so, when? Or must they all be equal? How are decisions made?

¹⁴⁰ M. Carr, *Power Plays in Global Internet Governance*, 43 MILLENIUM: J. INT’L STUD. (2015), 640, 642.

¹⁴¹ M. Kummer, *Multistakeholder Cooperation: Reflections on the emergence of a new phraseology in international cooperation*, INTERNET SOCIETY (14 May 2013), www.internetsociety.org/blog/2013/05/multistakeholder-cooperation-reflections-emergence-new-phraseology-international (last visited on 26 January 2016).

- What is the legitimacy of the stakeholder model? Why not direct democracy, direct representation? In an era where state interposition in international law is more and more called into question, it could seem outdated –but possibly necessary - to once again channel individual interests via states, or civil society organizations.

The answer to the question of the real identity of multistakeholderism is as of yet lacking. Multistakeholderism à la internet is basically an empty shell, making it even more useful (and more likely to be abused) as a strategic rhetorical tool. Being clearer about the reasons why we have multistakeholderism in internet governance would help us answer those fundamental questions.

The idea of multistakeholderism is widely, but not universally, accepted although, or perhaps precisely because, it is not substantiated and there are a lot of uncertainties that allow actors to practice multistakeholderism without truly changing the power dynamics. A solution would be to adopt a very broad definition of multistakeholderism that would cover a lot of practices. For instance, DeNardis and Raymond show that there is a wide range of practices that meet their definition of multistakeholderism, “two or more classes of actors engaged in a common governance enterprise concerning issues they regard as public in nature, and characterized by polyarchic authority relations

constituted by procedural rules.”¹⁴² This definition does not prescribe a specific relationship between the actors, nor does it explain the legitimacy of this kind of arrangements. Such a definition, as the authors themselves recognize, “leaves open the empirical question whether there is, in fact, a single distinctive kind of relations between actors typical of cases commonly described as multistakeholder.”¹⁴³ Some actually suggest that multistakeholderism is not so much a new governance model with a significant redistribution of powers among stakeholders but a novel way of consolidating existing governance arrangements under an appealing new name.¹⁴⁴ “[T]he lack of diversity in debates about Internet governance signal the potential for multi-stakeholderism to become ‘a rhetorical exercise aimed at neutralizing criticism’ rather than a truly unique and participatory mechanism for governing a global resource.”

There is a new trend that consists in qualifying multistakeholderism by adding adjectives, signaling that multistakeholderism in itself does not mean much: meaningful multistakeholderism,¹⁴⁵ equal multistakeholderism, or democratic

¹⁴² M. Raymond et al., *Multistakeholderism: Anatomy of an Inchoate Global Institution*, 7 INT’L THEO. (2015), 572, 573.

¹⁴³ *Id.* at 575.

¹⁴⁴ M. Carr, *Power Plays in Global Internet Governance*, 43 MILLENIUM: J. INT’L STUD. (2015), 640, 650.

¹⁴⁵ See generally J. Malcolm, *Criteria of meaningful stakeholder inclusion in internet governance*, 4 INTERNET POLICY REVIEW (2015), <http://policyreview.info/articles/analysis/criteria-meaningful-stakeholder-inclusion-internet-governance> (last visited on 6 November 2016).

multistakeholderism.¹⁴⁶ Is that enough? “As governments increasingly turn to Internet governance technologies like protocols and the Domain Name System for content control – whether good or bad – (...) there is increasing interest in gaining more formal jurisdiction for controlling these infrastructures.”¹⁴⁷ It is therefore urgent to define the roles of the stakeholders and dig deeper than the shallow surfaces at which we are currently swimming.

Section 3: Why multistakeholderism?

The existence of multistakeholderism has been justified in many different ways, which we are going to look at now. This overview will show that there are still some important questions to answer.

A. History

Some may at times be tempted to argue that multistakeholderism – the involvement of all stakeholders in the decision-making via a bottom-up process - is how internet

¹⁴⁶ See NETmundial, *Multistakeholder Statement* (24 April 2014), <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf> (last visited on 14 February 2016). See also N. Zingales et al., *In Search of the Holy Grail: A Principled Approach to Multistakeholder Governance in Internet Policy-Making*, Paper presented at GigaNet Conference (2015), <https://ssrn.com/abstract=2809920> (last visited on 3 November 2016).

¹⁴⁷ L. DeNardis, *Multistakeholderism and the Internet Governance Challenge to Democracy*, 34 HARV. INT’L REV. (2013), <http://hir.harvard.edu/multi-stakeholderism-the-internet-governance-challenge-to-democracy/> (last visited on 25 January 2016).

governance has always taken place – or is the closest to the way it has always been governed.¹⁴⁸

In her history of the internet, Abbate describes the innovative management style at DARPA that prevailed during the birth of the internet and was seen as the key to the successful development of this new technology.¹⁴⁹ The management style was actually making the most of the innovative features of the design of the network. For instance, the technical decision to introduce layering. Layering can be described as “dividing complex networking tasks into modular building blocks.”¹⁵⁰ To each building block corresponds a narrowly defined function (for instance, package the data in data packets, or route the data packets). Once a simple set of rules for joining the blocks together has been set, it is easy to build a coherent system even though many are involved in the process. Layering thus facilitated the involvement of many teams of computer scientists, who could work on their own on specific parts of the project without too big a risk of inconsistencies. Furthermore, the existence of the network eased communication among those teams, keeping coordination from becoming cumbersome. Management during the development stage of the internet was thus characterized by decentralization

¹⁴⁸ See e.g. in academia C. Schaller et al., *Internet Governance and the ITU: Maintaining the Multistakeholder Approach, The German Perspective*, COUNCIL ON FOREIGN RELATIONS (22 October 2014), <http://www.cfr.org/internet-policy/internet-governance-itu-maintaining-multistakeholder-approach/p33654> (last visited 23 February 2016). In the private sector, see e.g. ARIN, *Internet Governance and the Multistakeholder Approach* (2014), https://www.arin.net/knowledge/ig_factsheet.pdf (last visited 23 February 2016).

¹⁴⁹ J. ABBATE, *INVENTING THE INTERNET* (1999), 54.

¹⁵⁰ *Id.*

and a collaborative environment in which technical decisions were made by consensus. This management style has survived the expansion of the internet. Technical decisions about the development of the internet are made by groups whose membership is open to anyone so that all interested parties can get involved (though participants must act in their individual capacity and not as representative of companies or governments). The fact that decisions are made by “rough consensus” ensures that everybody’s opinions are heard and taken into account.

The role of governments - to the exclusion of the US government, which was directly involved via DARPA - was very indirect, by regulating the tech companies within their jurisdiction that would provide services at the physical layer level. Governments were mostly left out of the internet, which once again at the time was a research project and tool rather than the medium of great political, economic and social importance that it is today.

The reality was that a plurality of actors was involved and would make decisions as and when required, rather informally, in a piecemeal fashion. This was only possible because not a single government had control over the whole internet. It was also possible because the stakes did not seem that high. Otherwise, how to believe that the governments would have left it alone? Belief in market, as well as strong diplomatic pressure, would eventually lead the US government to let the internet go.

In the end, the sum of all these decisions by researchers, tech companies, and a few decisions made by the US government made up early internet governance. Many argue that there is no reason for the internet to be governed in any other way since this model succeeded in turning a research project and tool into a global medium for social, economic, and political activities.

This view would equate multistakeholderism with piecemeal, decentralized, uncoordinated decision-making by a wide variety of actors who are directly affected by the internet: the researchers that need it to conduct their research, the tech companies that provide services related to the internet. However, this does not fit in with the WSIS definition of multistakeholderism as two important pieces are missing: civil society and governments. How can civil society's status as a stakeholder be justified as it was not historically involved in creating or running the internet, unless we consider the community of computer scientists part of civil society? Even if we were to do so, civil society in general cannot be reduced to the technical community. Similarly, what about governments' involvement? The understanding of multistakeholderism promoted here is closer to regulation by the private sector and the technical community, to the exclusion of the people and governments, a far cry from the WSIS definition. As for legitimizing multistakeholderism, it falls short. Saying that "this is how things have always been done" hardly constitutes legitimate ground for multistakeholderism to rest on.

B. Necessity

Necessity is often invoked as the justification for multistakeholderism. Necessity comes in different flavors, however, depending on what aspect of the internet you decide to focus on. Indeed, this line of arguments relies on technological determinism and define necessity by reference to certain features of the internet.

A common argument among technical circles is that multistakeholderism is necessary because of the way the internet is designed. Specifically, multistakeholderism is mandated by the architecture of the internet itself. Its distributed nature and the fact that only few, though crucial, functions are centralized, seems to suggest that centralization, in the form of governmental power and top-down models of governance, are inadequate. Gatekeepers, in the form of a hierarchy or states, are incompatible with the design of the internet. On the internet, users can easily become “producers,” as they do not have the need to ask permissions before improving, innovating, creating. This empowering aspect of the internet, even though it may remain only theory for the vast majority of internet users, has created a different ethos: an open internet in which everybody has a say. This is for instance an idea that Google relied on in its petition against WCIT: “Internet policy should work like the Internet — open and inclusive.”¹⁵¹ By bringing together all spheres of society, multistakeholderism is

¹⁵¹ Google, *Online Petition Take Action*, (2012), <https://www.google.com/intl/en/takeaction/whats-at-stake/> (last visited 21 February 2016).

accomplishing just that: it brings everybody to the table, in theory not leaving anyone behind.

Others emphasize the fact that for it to work properly, the internet requires the collaboration of many players, so much so that governments alone would not be able to make the internet work. DeNardis and Raymond underline that

private companies, or private not-for profit corporations, play a considerable role in keeping the Internet operational. Private Internet registries like VeriSign oversee generic top-level domains. Individuals working for private companies contribute to standards-setting processes like the Internet Engineering Task Force (IETF), which has established the bulk of core Internet protocols, and the Institute for Electrical and Electronics Engineers (IEEE), which developed the Wi-Fi family of standards, among others. Network operators carry out network management tasks and respond to security problems on their private networks. Telecommunications carriers enter private contractual agreements to interconnect. Social media set privacy policies to which users must agree before using these services. This privatization of oversight is a dominant feature of how Internet governance has evolved in practice.¹⁵²

Desai, the Special Adviser to the UN Secretary-General on Internet Governance, added that “the Net is a product of partnerships and therefore its management has to reflect a modality of cooperation between stakeholders who normally operate on different sides of the fences that define the traditional structures of governance and of the market economy.”¹⁵³ It is only normal that the governance structure reflects that state of affairs.

¹⁵² L. DeNardis et al., *Thinking Clearly about Multistakeholder Governance*, Paper presented at Eighth Annual GigaNet Conference (21 October 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354377 (last visited on 5 November 2016).

¹⁵³ N. Desai, *Foreword*, 7-11, 8 in *THE POWER OF IDEAS: INTERNET GOVERNANCE IN A MULTI-STAKEHOLDER ENVIRONMENT* (Wolfgang Kleinwachter ed. 2007).

In a similar vein, it is often argued that classic governmental processes would be too slow to adapt to the fast-paced internet. Ira Magaziner, a policy adviser for President Clinton who was instrumental in the commercialization of the internet, wrote that “[w]e believe that the Internet as it develops needs a different type of coordination structure than has been typical for international institutions in the industrial age. Governmental processes and intergovernmental processes by definition work too slowly and somewhat too bureaucratically for the pace and flexibility of this new information age.”¹⁵⁴ The fast-paced internet environment requires equally fast-paced modifications of applicable rules, so as not to create unnecessary hurdles to the development of the internet.

The problem, however, with this approach is that it mostly justifies the involvement of the private sector – not so much of governments and not at all of civil society. Therefore, it only legitimizes the private sector’s role within multistakeholderism. Unless we accept that the legitimacy of multistakeholderism can be cumulative and result from various sources, necessity does not legitimize multistakeholderism.

¹⁵⁴ Ira Magaziner’s Introductory comments at the First International Forum on the White Paper on 1 July 1998, as quoted in M. Mueller, *Governments and Country Names: ICANN’s transformation into an intergovernmental regime*, Paper presented at the PTC Conference (2002), <http://docplayer.net/8310117-Governments-and-country-names-icann-s-transformation-into-an-intergovernmental-regime.html> (last visited on 5 November 2016).

C. Power

Other accounts of the rise of multistakeholderism in internet governance shed a very different light. For instance, Chenou argues that multistakeholderism was first introduced in internet governance discussions in the 1990s so as to “manufacture” consent¹⁵⁵ around internet governance arrangements proposed by a “power elite.”¹⁵⁶ This power elite comprised “the technical/scientific elite that had managed the Internet before its commercialization in the early 1990s,”¹⁵⁷ the “corporate elite”¹⁵⁸ with large telecom companies, computer manufacturers and intellectual property owners, “the US political elite, represented by the National Telecommunication and Information Authority (NTIA) of the Department of Commerce and the Internet Czar, Ira Magaziner,”¹⁵⁹ and the “non-US political elite” with inter alia the EU Commission, the OECD or WIPO.¹⁶⁰ Likewise, Carr argues that “multi-stakeholder Internet governance serves largely to reinforce existing power relations rather than disrupt them. Specifically, the multi-stakeholder model in Internet governance privileges the interests of those actors that were instrumental in establishing it.”¹⁶¹

¹⁵⁵ J-M Chenou, *From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-stakeholderism, and the Institutionalisation of Internet Governance in the 1990s*, 11 GLOBALIZATIONS (2014), 205, 217.

¹⁵⁶ *Id.* at 206.

¹⁵⁷ *Id.* at 210.

¹⁵⁸ *Id.* at 210.

¹⁵⁹ *Id.* at 210.

¹⁶⁰ *Id.* at 210.

¹⁶¹ M. Carr, *Power Plays in Global Internet Governance*, 43 MILLENIUM: J. INT’L STUD. (2015), 640, 642.

This reading of multistakeholderism underlines that we should not view the first implementations of multistakeholderism as significant for the purpose of determining what multistakeholderism should be. To that extent, it goes against the history and necessity accounts of the legitimacy of multistakeholderism. It also explains why civil society's position within multistakeholderism is the most uncertain. Civil society is not part of the "power elite."

If power plays account for the emergence of multistakeholderism in the 1990's, does it account for what multistakeholderism is now? Multistakeholderism has had a life of its own, to a large extent escaping its creators. If a new term is introduced without any meaning, it should not come as a surprise that someone somewhere will find it necessary to substantiate it at some stage. Multistakeholderism has been taken over, fiercely adopted by civil society to try and turn it into something more. Prominent members of the private sector are also on board. This account informs us of the reason why we have multistakeholderism but does not address its legitimacy. Irrespective of how multistakeholderism came into being, it may or not be legitimate.

D. Weberian legitimacy

Weber's work on the sources of legitimacy has inspired several internet scholars, who were, like Post, trying to establish the legitimacy of a plurality of actors.¹⁶² Indeed,

¹⁶² J. MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM (2008), 146.

Weber expands the sources of legitimacy beyond consent and beyond the state.¹⁶³ For instance, Malcolm identifies sources of legitimacy for each of the stakeholders. The state relies on its territorial sovereignty and the democratic representation of citizens' interests. The private sector derives its legitimacy from its "superior efficiency of free markets in the distribution of goods and services"¹⁶⁴ and civil society, from expertise, or in Malcolm's view, from its role in promotion of substantive values.¹⁶⁵ Ketteman departs from Malcom with respect to civil society. He argues that justifying civil society's status as a stakeholder by its expertise is incorrect as "it is premised upon the fallacious assumption that individuals, as a group, need to be especially legitimized to participate in governance process."¹⁶⁶ Ketteman's central thesis is that international law is about human beings and that individuals' participation in world affairs is of right, rather than being the exception. Which does not mean that anyone can participate in all internet governance matters. Rather, knowledge and representativeness justify the participation of a given individual in governance. "The legitimation potential of civil society draws from its role in aggregating and articulating opinions and acting as a filter and focal point of concerns common to individuals."¹⁶⁷ These sources of legitimacy are of equal importance. None of the stakeholders alone can claim to be legitimate.¹⁶⁸

¹⁶³ M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947), 328.

¹⁶⁴ *Supra* note 162 at 151.

¹⁶⁵ *Id.* at 152-153.

¹⁶⁶ M. KETTEMANN, THE FUTURE OF INDIVIDUALS IN INTERNATIONAL LAW: LESSONS FROM INTERNATIONAL INTERNET LAW (2013), 118.

¹⁶⁷ *Id.* at 119.

¹⁶⁸ *Id.* at 115. See also *supra* note 162 at 156.

Because each entity is independently legitimate, the involvement of all of them is required to make governance legitimate.¹⁶⁹

What these authors underline is that multistakeholderism stands for non-exclusivity of legitimacy, in contrast with the classic model that saw states as monopolizing legitimacy at the international level. Weberian legitimacy provides a better framework for legitimacy, one that clearly embraces the coexistence of legitimate stakeholders. But Malcolm and Kettelman's work raises many questions, including a deceptively simple one: how do we know these forms of legitimacy are equal? that there is no other stakeholder out there that is equally legitimate?

E. Consent of the governed

As we have seen above in Chapter 1, Section 1, many debates on legitimacy in internet governance have taken the form of a debate opposing the proponents of a state-centered system on the one hand and the supporters of self-regulation on the other hand. For the former, the internet is a mere communication tool that has not fundamentally altered the sovereignty of states. For the latter, internet has created a new world to which the legitimacy of states does not extend. The consent of the governed is the source of the power to govern and the relevant individuals have not consented to

¹⁶⁹ *Supra* note 162 at 156.

being governed by states. The Declaration of Independence of Cyberspace epitomizes this viewpoint.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective action.¹⁷⁰

Post is thinking along similar lines. While we usually think exclusively of the state as the entity able to receive such consent, it does not have to be the case. We must recognize that other entities are equally strong candidates, especially since the consent theory on which state legitimacy is built is not unimpeachable. For one thing, as Brilmayer¹⁷¹ explained, for the governed to give consent to a state requires that the borders of the states have already been defined, begging the question of who in the first place consented to that crucial determination. This paradox is well-known in the constitutional literature as the infinite regress issue.

This logical flaw shakes the foundations of the territorial state and opens the door to other forms of governing, such as a-territorial governance. According to Post, cyberspace allows consent of the governed to truly become the source of power by getting rid of the incorrect territorial presumption. Only those who have consented are

¹⁷⁰ J. P. Barlow, *Declaration of the Independence of the Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/cyberspace-independence> (last visited 23 April 2016).

¹⁷¹ L. Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. (1989) 1, 10.

bound by the governing entity's decisions. How would this work in practice? How would we recognize that consent has been given if we drop the traditional frame of reference that assigns a large role to elections? The idea that the state is not the only possible recipient of the consent of the governed opens up possibilities and prompts Post to ask

(1) Whether the state (as opposed to these alternative agents of collective action) is the institution best able to serve the agency role contemplated by the theory of Liberal sovereignty for a given population? and, (2) How we might recognize alternative delegations of "sovereignty" away from the state and toward these alternative institutional arrangements?¹⁷²

For Post, this theory, when applied to the internet, will lead to the rise of "decentralized and a-geographical lawmaking groups that do not impose order on the electronic world but through which order can emerge."¹⁷³ He argues that network access providers could be the relevant units of governance as the choice of a network access provider amounts to consent by the customer.¹⁷⁴ The question that Post's theory raises, from the multistakeholderism point of view, is whether individuals may consent to being concurrently governed by several entities (here states and civil society) or whether

¹⁷² D. Post, *Unsettled Paradox, The Internet, the state, and the consent of the governed*, 5 IND. J. GLOBAL LEGAL STUD. (1998), 521, 536.

¹⁷³ *Id.* at 539.

¹⁷⁴ *Id.* at 539.

consent can only be granted to a single entity. One of multistakeholderism's challenges is that it requires an "and" approach, rather than an "either or" approach. Thus the focus on consent does not immediately provide legitimacy to multistakeholderism.

In this Chapter, we have seen that multistakeholderism has started taking roots in internet governance. However, those roots are still fragile and resting on uncertain grounds. The reason is that multistakeholderism does not mean much, or rather that it means different things to different people. A decade after the word was first introduced, it remains unsubstantiated. The upside is that multistakeholderism is often invoked and has become a familiar figure in internet governance. Furthermore, some have taken it to heart to turn this trendy concept into reality. In particular, civil society has been consistently pushing for more multistakeholderism. This is not surprising. Of all three major stakeholders, civil society is the one that is in the most precarious position, being more of an outsider. Indeed, states, though latecomers, have relied on their historically exclusive role in international affairs and democratic legitimacy to claim their spot in internet governance, while the private sector's practical role in the functioning of the internet has helped it to some extent. Civil society on the other hand is having a harder time asserting itself. To move from supporting multistakeholderism as a rhetorical tool to actually embracing multistakeholderism in practice, we need solid foundations. Who are the stakeholders? How do they act and interact? To be able to answer, we need to think about legitimacy in internet governance, and we need to think fast. Alternative

models of governance, in particular intergovernmental processes, are constantly being promoted. It would be so easy to fall back onto them. It is far more difficult to promote multistakeholderism and come up with a legitimacy rationale that not only supports multistakeholderism in a way that is acceptable to all but also integrates seamlessly with existing governance models, including state sovereignty at the domestic level.

Some of the justifications for multistakeholderism offered so far have emphasized history or necessity but have failed to convince. The course of history may be changed and necessity is very subjective and malleable. We have learnt with Lessig that there is nothing “natural” about the internet and its design could be modified so as to create a new version of “necessity.” These models also lack reproducibility: their validity is limited to internet governance and as a result, less powerful. Weberian grounds for legitimacy do make room for all stakeholders but this room is not well-defined and leaves open the question of the relationships between stakeholders. As for revisiting the consent of the governed, it provides a potential ground for the legitimacy of non-state stakeholders, but may do too good a job at discrediting states. Overall, these models do not focus on the consequences of what is at the heart of multistakeholderism, that is to say non-exclusivity. Non-exclusivity requires unpacking the relationships among stakeholders and their respective legitimacy. Those questions must be answered before multistakeholderism can really establish itself as an alternative to intergovernmentalism and I propose to rely on global constitutionalism to start providing answers. The next

two chapters thus take us away from the field of internet governance to focus on global constitutionalism.

CHAPTER 3: LEGITIMACY, CONSENT AND GLOBAL CONSTITUENT POWER

In this chapter, I explain why I rely on the notion of global constituent power to approach the question of the legitimacy of multistakeholderism. I start by showing that global constitutionalism is essentially about democratic legitimacy, which obtains from the consent of the constituent power (Section 1). I then emphasize that for the legitimating mission of global constitutionalism to succeed, we need to rethink how consent happens, in all three dimensions: time, manner of the consent and most importantly identity of the consenter (Section 2). Finally, I use an example from internet governance to illustrate the fact that it may be seen as undergoing constitutionalization (Section 3).

Section 1: The promise of democratic legitimacy at the heart of the global constitutional project

First introduced by Alfred Verdross in the 1920's, global constitutionalism has been gathering increasingly larger throngs of supporters since the early 1990s. This has been particularly true among European Union scholars who have looked to global constitutionalism to strengthen the conceptual foundations of the EU and its expanding powers. Global constitutionalism, generally speaking, is often portrayed as providing tools to increase legitimacy beyond the nation-state, for instance by “improv[ing] the

effectiveness and fairness of the international legal order,”¹⁷⁵ or “placing limits on the activities of international organizations, subjecting those organizations to standards of proper behavior.”¹⁷⁶ Global constitutionalism would also be the answer to the fragmentation of international law.¹⁷⁷ Nevertheless, the benefits of global constitutionalism are not to be felt solely at the supranational level. Indeed, the globalization of more and more areas of life, from communication to trade, means that many such activities often fall outside of states’ reach. Global constitutionalism has the ability to “compensate” for the “de-constitutionalization” at state level.¹⁷⁸ Thus global constitutionalism may be seen as complementing domestic constitutionalism, rather than competing against it. More rarely, however, is it mentioned that global constitutionalism offers the promise of self-government, which I believe is central to the global constitutional project. I shall thus focus on this contribution of global constitutionalism.

¹⁷⁵ A. Peters, *The Merits of Global Constitutionalism*, 16 Ind. J. Global Legal Stud. (2009), 397, 397.

¹⁷⁶ J. Klabbbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. (2004), 31, 32.

¹⁷⁷ The famous Kadi and Yusuf cases by the Court of First Instance of the European Union are frequently cited as evidence of this trend. In those cases, The Court of First Instance reviewed the compatibility of certain resolutions of the UN Security Council with jus cogens norms. Both cases were later overruled by the Court of Justice of the European Union but nevertheless remained as prime examples or symptoms of current trends. Cases T-315/01, Kadi v. Council and Commission, 2005 ECR II-3649; Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council and Commission, 2005 ECR II-3533.

¹⁷⁸ A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT’L L. (2006), 579, 580. See also J.L. Dunoff & J.P. Trachtman, *A Functional Approach to International Constitutionalization* 3-36, 10, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (J.L. Dunoff & J.P. Trachtman eds. 2009).

Simply put, global constitutionalism consists in taking constitutional ideas, values, frames of reference beyond the nation-state, where constitutionalism was born. This exercise raises many logistical questions. Which parts of constitutionalism do you keep? Which ones do you discard? But before even delving into those considerations, we must ask why. Why in the first place bringing constitutionalism to the global stage? Global constitutionalism can be viewed as a lens, among many other available lenses, through which to look at developments in international law. The engineers of global constitutionalism are scholars and there is no hard evidence that it is the right – or wrong for that matter – way of looking at the world. Global constitutionalism can contribute to supplying leads, tips, and answers to some difficult questions and guide further developments. Going back to the why of global constitutionalism, a short answer is legitimacy. Global constitutionalism comes with a legitimating mission. It provides a set of answers to shut down doubts that may arise concerning international law.

Old controversies – is it even law? Do we have to obey it? – on the nature of international law aside, new phenomena have come to disrupt the traditional foundation of international law, which is state consent. This is a blow to the voluntarist framework that has been prevalent in international law. Voluntarism, first elaborated by Vattel and further developed by Moser and G.F. de Martens, posited that the law agreed upon by the states was not subordinated to natural law. It was a clear break from past visions of

international law which, if they did recognize the existence of a states-made law, made clear it was subordinated to natural law and only valid to the extent it was compatible with natural law. In this early version of voluntarism, states, by their consent, could modify natural law and decide how they would behave. This contractual vision of international law will gradually be radicalized, with the complete eviction of natural law from the equation by the end of the 19th century. There is nothing above the will of the states. There is nothing but the will of the states.

Two relatively recent phenomena have weakened the voluntarist foundation of international law. The rise of international organizations and the expansion of their quasi-regulatory competences is one such phenomenon. The principal-agent relationship that characterizes, according to the traditional view, the relations between an international organization and its member states is under severe strain. With the inflation of norms adopted by the international organizations, it is impossible for member states to keep up. Furthermore, peremptory norms of international law, or norms of *jus cogens*, stand for the fact that there are rules of international law that are so important that they apply regardless of whether states have consented to them. Though the idea of *jus cogens* had been floating around for some time, its introduction into international law results from the atrocities of the Second World War.¹⁷⁹ More

¹⁷⁹ S. KADELBACH, *JUS COGENS, OBLIGATIONS ERGA OMNES AND OTHER RULES – THE IDENTIFICATION OF FUNDAMENTAL NORMS* (2005), 22.

recently, it is often pointed to the Yusuf and Kadi cases,¹⁸⁰ those cases in which the Court of First Instance of the European Union examined the compatibility of certain acts of the United Nations Security Council with jus cogens. They are understood as suggesting that “no one is above the law; what matters is that the CFI suggested that there is some legal space hovering over all political activities, containing some untouchable norms which themselves originate in the hearts and minds not of selfish states, but of humanity itself.”¹⁸¹

To summarize, we have here instances where international law is being created without the consent of the states. It cannot be denied that jus cogens is a positive development. Suffice is to refer to the Nuremberg trials to be convinced. It remains however that it does not fit in well with the international legal system. How do you explain that states, whose consent is at the center of the system, may not derogate from jus cogens? As for international organizations’ expansion, it is often justified by functionalism. But is that enough? As Kumm shows,¹⁸² the changing role of state consent is a problem not just for states as abstract entities, but also for the citizens of those states. These developments seem to weaken the capacity of citizens – in democracies that is – to have a say in the creation of the norms that govern them. It decreases their capacity to govern themselves. Once the veil of the states is lifted, we see more clearly the concerns that

¹⁸⁰ *Supra* note 197.

¹⁸¹ J. KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009), 2.

¹⁸² M. Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. OF INT’L L. (2004), 907, 910.

arise from the above-mentioned developments in international law. We cannot just brush them aside by saying that “it is for the good of the people.” As it directly negates, or at the very least weakens individuals’ self-government, the question must be addressed.

Global constitutionalism brings most, if not all, these pieces together to form a coherent order, a framework that is more robust than the one relying on state consent. The weakness of voluntarism is that it does not accommodate any exceptions to its model. By promoting such a vision of international law, which is nothing more than what states decide, it makes it impossible for any international law to stand that is not strictly what has been consented to. There may be implied consent, tacit acceptance, or functionalism that stretch the scope of the consent of the states beyond what has expressly been consented to. But it is merely stretching, pushing, and does not provide a solid foundation for entirely new blocks of international law. It makes the blocks of law thus legitimated more vulnerable to attacks and violations.

On the contrary, global constitutionalism, while not departing fully from consent, integrates it in subtle ways. We should, however, be wary of not removing consent entirely lest we would promote an undemocratic system. Generally speaking, global constitutionalism does not make state consent a necessity. This statement is troubling at first. Rest assured. Global constitutionalism does not completely eliminate the need

for consent. It just comes at a different time and from a slightly different source. Or at least it should.

If we go back to domestic constitutionalism, the scenario is as follows. The constituent power – a single entity made up of individuals – adopts a constitution that spells out the rules that will more or less directly govern the life of those very individuals and their children, by constituting a government that may only act within the rules established by the constituent power. Put differently, there are outside limits imposed on the day-to-day governing of the people. These limits are not created by the constituted powers but come from the constituent power, who is distinct from the constituted powers. The constituent power has the power to impose limits because it has the power to create. The limits may be substantive, taking the shape of fundamental rights granted to individuals. There are also structural limits, such as regular elections, making the government being accountable to citizens, separation of powers and checks and balances or a constitutional court.

The idea of constituent power is a “direct challenge to the positivist premise that legal-constitutional authority is conclusively justified by the fact of its successful reduction to canonical constitutional form.”¹⁸³ For instance, according to positivist French author Carré de Malberg, the question of the original legitimacy of the original constitution is

¹⁸³ N. Walker, Post-Constituent Constitutionalism? The Case of the European Union 247-268, 248, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (M. Loughlin et al. ed. 2008).

a question of fact, not of law. The constitution is the act by which the peoples become an organized society, by which a state is created and law becomes possible. Thus before the constitution, it is impossible to find a legal answer to the question of who should have the power to make the constitution. The legitimacy of the constitution is not dependent on who originally created it. Once a constitution has been created, however, any change to the constitution, whether an amendment or a completely new constitution, must be agreed on in compliance with the currently valid constitution.¹⁸⁴

On the contrary, the concept of constituent power stands for the proposition that “authority should be duly authorized—that it should possess an authentic democratic pedigree. That is to say, those who are ‘constituted’ as the subjects of constitutional authority should also be its ‘constituent’ authors.”¹⁸⁵ It also requires that “in its design, execution, and application, the constitutional form produced by the constituent power should carry a resilient guarantee of ‘democratic’ fidelity to the interests, values, potential, or otherwise-conceived ‘goods’ associated with that constituent power.”¹⁸⁶

The notion of constituent power is an indispensable ingredient of self-government. Indeed, the creation of the notion of constituent power has opened the door to the containment of constituted powers, and correspondingly the preservation of the sovereignty of the people, the holder of the constituent power. At the end of the 19th

¹⁸⁴ 2 CARRÉ DE MALBERG, CONTRIBUTIONS À LA THÉORIE GÉNÉRALE DE L’ÉTAT (CNRS 1922), 490.

¹⁸⁵ *Supra* note 203 at 248.

¹⁸⁶ *Supra* note 203 at 248.

century, this was no small feat. In the years following Independence and before the adoption of the federal constitution, the various states had experimented with, and arguably suffered the consequences of, sovereign parliaments that had abused their powers and ignored public interest.

As a result, it was decided that sovereignty should be in the hands of the people and that the legislative power should be subordinated to the people. This was achieved through the creation of a constituent power that would belong to the people and would be separated from constituted powers. The constituent power is the source of all powers. It is the maker of the constitution. By contrast, the constituted powers are those that are created and defined by the constitution. They only exist as a result of the constitution and must be exercised within the boundaries set out in the constitution. The hope is that constituted powers will not outstep their role and in particular, deprive people of the rights that were enacted in the constitution. The constituent power belongs to the sovereign, and thus the constituent power sits above the constituted powers. In the American version, the constituent power is exercised by a specific body, the convention, which is distinct from the legislature and specially created for the purpose of adopting a constitution. The constituent power is sometimes said to be a corollary to the separation of powers. Indeed, to ensure that powers remain separated, we need to make sure that they cannot themselves change the extent of their own

powers. This requires a superior authority, which can impose its will onto the constituted powers, i.e. the constituent power.

An important contribution of the constituent power consists in providing an explanation for where the constitution come from. This has probably been most relevant in the French context, and thus underlined mostly in French literature. Klein notes the similarities between the discourse on constituent power and the religious discourse¹⁸⁷ and indeed Preuss remarks that “[t]he concept of a constituent power invented by a theologian, is a famous example of what has been called political theology: The constituent power is the secularized version of the divine power to create the world ex nihilo.”¹⁸⁸ Both aim at answering the question of the origins, of how it all started. What was there before the state? Where does the constitution come from? How is it created? By whom?

At the time when the notion of constituent power was picked up by the French, they were still operating under an absolute monarchy. The king was the sovereign and the origin of his powers was divine. Religion was still the explanation for authority. Constituent power, coupled with popular sovereignty, allowed for the people to become the source of all power, the maker of the constitution. Thus replacing the divine

¹⁸⁷ C. KLEIN, THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT (1996), 10-11.

¹⁸⁸ U.K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639 (1992), 143, 144.

narrative, constituent power offered an empowering account of the origins for the people.

When we transpose this framework to international law, we should have a global constituent power that would consent to a global constitution that would set global rules, global limits for global governance. These limits may be substantive or more structural, as we have seen above. The global constitution might also constitute a government, that would operate within the limits set by the constitution.

Within this framework, it seems easier to address and justify the recent phenomena mentioned above. In particular, global constitutionalism can justify situations in which state consent is not required. But that requires a shift in perception. Instead of seeing international law as stemming from states and state consent, we need to re-imagine it as being a composite of whatever is decided by constituted powers as creators of international law within the limits imposed by the constituent power via the constitution. State consent remains relevant as states are constituted powers that are creators of international law but they act according to the guidance given by the global constituent power in the form of the constitution.

If we take *jus cogens* norms, a global constitutionalist approach would consider *jus cogens* norms as part of the constitution itself. They are akin to fundamental rights in the domestic context and constrain the actions of constituted powers for the benefit of the people. This is why they can be imposed onto states, without their prior express

consent. The authority to set limits to states' actions does not stem from the states' consent to it but comes from the global constituent power.

If we regard international organizations as constituted powers that are bound by the constitution, their expansion appears less problematic. Their expanding regulatory and quasi-judiciary roles are bound by a set of constitutional rules, instead of being bound by the scope of the member states' consent. It does away with the need to trace their actions back to a grant of power from member states, while still keeping international organizations constrained by constitutional rules.

By changing the role of state consent in the framework of international law, from a central all-justifying function to a toned-down subordinated role, the global constitutional framework better accounts for and legitimizes the changes that we have been witnessing in international law – provided the global constituent power gets to consent.

Section 2: The central role of the global constituent power's consent

The legitimacy of the global constitutional framework rests entirely on consent. As we have seen earlier, global constitutionalism displaces the need for consent from the states to the global constituent power.

A. A well-known pattern in domestic constitutionalism

In the domestic context, consent happens early in the process, at a single point in time (though there may be amendments). Consent of the constituent power is required in setting up the original plan. The government of the governed by themselves, which is often cited as the definition of democracy, does not mean that the governed actually make all the decisions. It means that they make what is seen to be the single most important decision to set the rules that would govern their government. Thus what we are talking about is indirect government of the governed by themselves and the question of consent is tied to a specific stage in the constitution-making process.

Schematically, the constitution-making process in the domestic context follows these steps:

1. Drafting. The actual drafting is usually not done by the constituent power, which is only given the option of either approving or rejecting the draft constitution. Some modern constitution-making processes however have attempted to involve the people into the drafting process by holding consultations at the community level or by inviting the public to watch, attend and participate in drafting meetings.¹⁸⁹

¹⁸⁹ B. Thorarensen, *Why the making of a crowd-sourced Constitution in Iceland failed*, CONSTITUTION MAKING & CONST. CHANGE (26 February 2014), <http://constitutional-change.com/why-the-making-of-a-crowd-sourced-constitution-in-iceland-failed/> (last visited on 3 November 2016).

2. Adoption of the constitution by the constituent power by a vote. This is the consent per se.
3. The constitution enters into force, constituting and concomitantly constraining the constituted powers – executive, legislative and judiciary – and granting constitutional status to a list of fundamental rights for the benefit of individuals.
4. Life pursuant to the constitution. A constitutional court usually serves as the arbiter ensuring compliance by the constituted powers with both the letter and the spirit of the constitution. Life under a given constitution ends with the adoption of a new constitution.

When we move to the international scene, how does it work?

B. Imagining consent in global constitutionalism

The well-known pattern of domestic constitutionalism cannot apply without substantial modifications as difficulties of two orders arise.

Identity of the consenter

In the domestic context, the question of the identity of the constituent power usually does not raise issues. Only in the case of states in transition has the issue arisen. In theory, however, scholars still struggle with the infinite regress difficulty: who decides who the constituent power is? Klein has argued that the constituent power can be considered as, and is actually largely considered as, a necessary myth. It is necessary as

it provides a reason why the constitution is binding.¹⁹⁰ It may be seen as a myth, in the sense of “a traditional story, typically involving supernatural beings or forces, which embodies and provides an explanation, aetiology, or justification for something such as the early history of a society, a religious belief or ritual, or a natural phenomenon.”¹⁹¹ And that story is that “in the beginning was constituent power. From it and only it everything derives. Without it there is no binding legal order. Without it there is no legal basis for the constitution.”¹⁹² On the contrary, the case law of the constitutional courts in Israel and South Africa takes the view that the constituting process falls within the jurisdiction of the court, thereby indicating that the realm of the law does not start with the constitution but predates it.¹⁹³ The debate is not settled. In practice, the exercise of the constituent power is normally governed by domestic law, for instance by the legislation on elections (age requirements, need to register etc.).

When we move to the global level, there is no simple ready-made answer. Intuition or habit might make us believe that states are the ones that should consent. This is the principle underlying voluntarism. But as the case of *jus cogens* shows, the consent of states is not always required, which tends to show that they are constituted powers rather than the constituent power. This leaves the door open for other possibilities,

¹⁹⁰ C. KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT* (1996), 193.

¹⁹¹ OXFORD ENGLISH DICTIONARY ONLINE (2016).

¹⁹² *Supra* note 190 at 192.

¹⁹³ C. Klein, *Le Pouvoir Constituant* 6-29, in 3 *TRAITE DE DROIT CONSTITUTIONNEL* (Troper et al. eds. 2012), 29-31.

such as the global demos, the sum of all domestic constituent powers, or the international community (whatever that may mean). The identity of the consenter, of the global constituent power, is not the only aspect of the consent to the constitution that needs to be adjusted.

Time and manner of consent

Some argue that the UN Charter is the global constitution,¹⁹⁴ but that is only a minority of scholars. For most, there is not a single text that would qualify as the global constitution. Instead, most scholars identify norms and ascribe them a constitutional nature. They talk more of constitutionalization than of constitutions. There is not a single “constitutional moment” at which the global constituent power is summoned to consent. The process they are observing is an organic evolution of the law rather than a deliberate design, unlike what is usually the case at the domestic level.¹⁹⁵

The constitutionalization process is pointillist in nature. Dots after dots are added to the canvas, slowly uncovering the contours of the landscape. It is necessary to take a step back to see how seemingly isolated events eventually come together. This artistic analogy provides a vocabulary to describe the constitutionalization process. In the remainder of this dissertation, constitutional dots will refer to these instances in which a new step in the constitutionalization of global governance will have been taken.

¹⁹⁴ See e.g. B. Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT. (1998), 529.

¹⁹⁵ J. KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009).

Constitutional dot-making refers to the adoption of rules that are constitutional in nature.

What makes a rule constitutional in nature? What is constitutional governance? To define constitutional governance requires to think outside of the box labelled “constitution.” Ackerman reminds us that not all domestic constitutionalization even happens this way. Leaving the case of the UK and its unwritten constitution aside, there are “constitutional moments” that legitimately modify the constitutional order despite not following the amendment procedure provided for in the constitution. Ackerman notes that those constitutional moments follow a particular procedure, which includes a proposal, public debate, ratification and consolidation by the constituent power.¹⁹⁶ This procedure guarantees the openness of the change. The challenge of defining constitutional governance lies in capturing all of these moments. Which dots are part of the constitutional picture and which are not?

There is a constitutional threshold beyond which a dot can be called constitutional. It has two components, a substantive one and a procedural one. The substantive requirement is that the content of the dot must relate either to the management of constituted powers (for instance allocating power or on the contrary, constraining

¹⁹⁶ B. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), 266-288.

them) or to the introduction of rights and freedoms for the enjoyment of individuals.

The procedural requirement consists in the consent of the global constituent power.

Concretely speaking, constitutional dot-making is triggered in one of two ways. The phase preceding the constitutional dot-making – the drafting stage - may be accidental, when it consists in uncoordinated action. Because of this informality, it might be more difficult for this initial phase to later be considered as material for constitutional dot-making. Such initiatives will typically be sub-global, for instance regional, and take shape by accretion. Repeated actions might be necessary for the initiative to become the reference, relying on the network effect. The internet principles hype described in Chapter 1 is a good example. On the contrary, intentional constitutional dot-making is characterized by the intent of the actors to engage in global constitutional dot-making. An example would be the UN Charter, as analyzed by Fassbender.¹⁹⁷

In such a context, the first two steps of the domestic constitutional process – the drafting and the adoption of the constitution – cannot be transposed without substantial modifications. On the one hand, there is no drafting stage as such, by which I mean that at the time of drafting, it is not perceived as global constitutional drafting. Instead, there is a screening for norms that have the potential of becoming constitutional. Who does the screening? As is the case with drafting, the screeners are not necessarily the constituent power. It may be courts, or states that by their actions,

¹⁹⁷ More on Fassbender in Chapter 4.

or often in their discourse, isolate certain principles. On the other hand, the adoption of the constitution is not a single event but takes place every time a dot is added to the global constitutional canvas. This necessarily has an impact on how consent comes about.

Thus the question of consent has multiple dimensions that need to be reworked as we move to the global level:

- the time of consent
- the manner of consent
- the identity of the consenter.

Before delving into the literature that has addressed these aspects of global constitutionalism, let us look at internet governance and its constitutionalization efforts.

Section 3: The constitutionalization of global internet governance – a status update

When looking at internet governance through the global constitutionalist lens, we can identify efforts to establish certain norms as meta-norms of reference constraining the policy choices made not only by governments, but also the private sector. These may be construed as constituting the substantive dimension of constitutionalization. I will use the example of the right to internet access as an illustration.

The history of the right to internet access shows that the actions of several domestic and international actors may converge to try and establish internet access as a global constitutional dot.

The story of the right to internet access began with domestic legal instruments – legislative, regulatory and constitutional – being adopted in a handful of countries and declaring internet access, understood as the right to connect to the internet, as a legally protected right. Later came a highly publicized case by the French Constitutional Council. This case dealt with the infamous HADOPI law that introduced the “three-strike system,” in which third-time online copyright infringers may see their Internet connection suspended for a period of time. The French Constitutional Council held that:

In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right [freedom of speech] implies freedom to access such services.¹⁹⁸

Although the Court did recognize the right to access the Internet, it did not hold that disconnection was unconstitutional, as long as a judge, as opposed to an administrative agency, made the decision. It stated that disconnection was both necessary and proportionate to the purpose it sought to achieve, that is the protection of intellectual

¹⁹⁸ Cons. const., 10 juin 2009, décision n° 2009-580 DC, Loi favorisant la diffusion et la protection de la création sur Internet, www.conseil-constitutionnel.fr/decision/2009/2009580dc.htm (last visited on 2 November 2016) (FRANCE).

property. The Court logically extended the legal regime applicable to freedom of speech, which allows for necessary and proportionate restrictions, to this new freedom to access Internet services.

The French case was quoted a few months later by the Costa Rican Constitutional Tribunal,¹⁹⁹ albeit in a different context. According to the claimants, the government's failure to timely reassign frequencies in compliance with Costa Rica's Trade Agreement with the United States, the Dominican Republic and Central America, had negatively affected the exercise of their rights. After quoting the French case, the Constitutional Tribunal stated that the government had the obligation to promote and guarantee the universal access to the Internet. It concluded that the government's delay in opening the market for telecommunications amounted to, among others, a breach of "the right of access to new information technologies, the right to equality and the eradication of digital divide (info-exclusion) – article 33 of the Constitution, the right to access the Internet through the interface chosen by the consumer, and freedom of enterprise and commerce."²⁰⁰

Even though both the French and Costa Rican cases have recognized a new right to Internet access and even though the Costa Rican decision relies on the French decision, the content of the right recognized in each case is different. In the French case,

¹⁹⁹ Corte Suprema de Justicia, Sala Constitucional, 30 June 2010, Exp: 09-013141-0007-CO. Res. N° 2010012790 (COSTA RICA).

²⁰⁰ See *id.*

recognizing a right to internet access requires the government not to interfere with such right beyond what is necessary and proportionate. On the contrary, the Costa Rican Constitutional Tribunal imposes an obligation on the state to actively provide its population with access to the Internet. Emphasis is placed on the connectivity dimension of the right to Internet access. Connectivity refers to the possibility to gain access to the network.²⁰¹ There is another side to the right to access the Internet, which consists in the possibility to access all the data that flows through the network once you have gained access to the physical layer. This is the content dimension of Internet access right, which is actually at stake in the French case. Indeed, in the French case, disconnection is analogous to almost completely blocking the content of the Internet (email communications are still allowed) on a person-by-person basis. Thus, the French case is properly analysed as a content case, as opposed to a connectivity case.

Both cases were later mentioned in the UN Special Rapporteur on freedom of speech on the internet, Franck LaRue, who labels them both as cases making internet access a fundamental right.²⁰² The Special Rapporteur himself did not say that internet access was a human right, but encouraged states to make internet access a priority. A similar discourse could be observed in other international organizations. For instance, the

²⁰¹ P. De Hert et al., *Internet (Access) as a New Fundamental Right. Inflating the Current Rights Framework?*, 3 EUR. J. L. & TECH. (2012).

²⁰² F. La Rue (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), *Report to the Human Rights Council*, ¶65, U.N. Doc. A/HRC/17/27 (16 May 2011).

OSCE Representative on Freedom of the Media²⁰³ issued a press release stating that internet access should be considered a human right. Together with the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, the UN Special Rapporteur and the OSCE Representative issued another declaration stating that freedom of speech "imposes an obligation on States to promote universal access."²⁰⁴ So far, the organs of the international organizations they are reporting to have failed to declare internet access a human right. Only the UN Human Rights Council has somewhat continued the trend by adopting a resolution cautiously declaring that human rights equally apply online.²⁰⁵

A positive aspect of judges' participation in internet governance is that it allows for the participation of less developed countries. Indeed, it gives a chance for countries like Costa Rica, which is not otherwise a major player in global Internet governance, to indirectly weigh in. We should also underline the crucial role of relay played by the international organizations' rapporteurs. They are the ones that brought the right to internet access from the domestic level to the international level.

²⁰³ OSCE Representative on Freedom of the Media, *Internet blocking practices a concern, access is a human right* (8 July 2011), <http://www.osce.org/fom/80735> (last visited on 8 April 2016).

²⁰⁴ F. La Rue et al., *Joint Declaration On Freedom Of Expression and The Internet* (1 June 2011), <http://www.osce.org/fom/78309?download=true> (last visited 12 April 2016).

²⁰⁵ UN, Human Rights Council Res. on The Promotion, Protection and Enjoyment of Human Rights on the Internet, U.N. Doc. A/HRC/20/L13 (29 June 2012).

This initiative is an illustration of accidental constitutionalization as the intent to constitutionalize is absent from the mind of the actors involved in the drafting stage. What would turn this chain of events into a global constituent dot would be the consent of the global constituent power. This leaves us in a dead-end as the identity of the global constituent power is, as of yet, unknown.

In this chapter, we have shown that global constitutionalism could provide an answer to the legitimacy deficit currently suffered in internet governance. Democratic legitimacy is indeed at the heart of the constitutional project and requires that the constituent power consent to the constitution. When we move to the supranational level, adjustments need to be made. The role of state consent changes from being central and indispensable to being somewhat downgraded. The time and manner in which consent happens at the global level needs to be rethought. The pointillist nature of global constitutionalization prevents the domestic constitution-making process from being transposed as is. Finally, and critically, the identity of the global constituent power needs to be ascertained as all constitutional legitimacy stems from it. The next chapter will provide an overview of existing literature on the global constituent power.

CHAPTER 4: LOOKING FOR THE GLOBAL CONSTITUENT POWER

A review of existing literature on the global constituent power reveals that the topic has barely been addressed. We will see that the emerging theories of global constituent power adopt different approaches, but share common traits (section 1). As the field remains relatively unexplored, major gaps become quickly apparent (section 2).

Section 1: Emerging theories of global constituent power

Before reviewing the existing literature on the global constituent power, I will start by clarifying the scope of this exercise. I am not addressing the body of literature that questions the inner workings of constituent power. This extensive literature answers a different question. Instead of focusing on “who is the constituent power,” it focuses on how or what. How does the constituent power come together? What is the constituent power? Examples of prominent debates are infinite regress, constituting the constituent power or how to go from a multitude of “I”s to a “we.” These issues, while important, are premature in the case of global constitutionalism. The earlier question of “who” has not been answered satisfactorily. In these days of humanization of international law, what should be the role and status of individuals? What should be the role and status of states? The rise of non-state actors generally, and the emergence of multistakeholderism as a potential governance model specifically, put a challenging spin on the binary “individuals or states” question. Identifying the global constituent power

would do a lot to contribute to the conceptual clarity of global constitutionalism and global governance.

Table 3: Overview of global constituent power theories

Who is the global constituent power?			
	Peoples of the nation-states (if yes, how do they act?)	States	Global People (if yes, how does it act?)
Besson	No	Yes (no democracy condition)	Yes (not exactly directly, through democratic participation)
Fassbender	Yes (indirectly)	No	No
Habermas	Yes (indirectly if democracy)	No	Yes (unknown)
Peters	Yes (indirectly if democracy)	No	Yes (directly through individualist track)
Walker	Unknown	Unknown	Yes (indirectly)

One could summarize the emerging theories of constituent power beyond the nation-state in just a few words: power to individuals and to a lesser extent, states. Indeed, somewhat unsurprisingly, states remain a central figure of the constituent power beyond the nation-state, if not as a fully-fledged member of the constituent power, at least as an integral part of how it is exercised.

A. Individuals are members of the global constituent power

All the scholars here assume that individuals are members of the global constituent power. They may not be the exclusive global constituent power, or exercise this power unmediated, but the premise from which all scholars start is that of popular sovereignty. As we saw above, the constituent power was conceived as a tool of self-government. For it to fulfill this promise, it has to be in the hands of the governed and the governed are (according to some, non-exclusively, as we shall see below) individuals.

The status of individuals in international law has changed from that of object to that of subject of international law. The door to the recognition of non-state entities as international legal subjects was open by the International Court of Justice in a 1949 Advisory Opinion,²⁰⁶ in which it declared that the UN had international legal personality. However, it is not until much later that individuals acquired international legal personality as well. The constant expansion of human rights law since the Second World War, which has not only given individuals rights but has also provided them with avenues to enforce them without the interposition of their state, has been construed since the 1990s as indicating that individuals have also become international legal subjects. This profound change has impacted all areas of international law - we speak of the “humanization of international law.”²⁰⁷ By recognizing that individuals are

²⁰⁶ International Court of Justice, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 179.

²⁰⁷ See generally T. MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006).

directly affected by international law, the humanization of international law makes it even more necessary to grant individuals the status of constituent power. As Besson remarks, “[d]emocratic legitimacy actually requires a self-constituting process when constitutional constraints have started applying and unilaterally constraining law-making processes without giving individuals affected a right to have a direct or indirect input into the identification of those constraints.”²⁰⁸ Though the exact impact of the humanization of international law is sometimes debated,²⁰⁹ it supports individuals as constituent power beyond the nation-state.

While there is a consensus among the reviewed scholars on this point, they have diverging opinions on how individuals get to be the constituent power.

B. Single constituent power

By single constituent power, I mean that the constituent power is made up of units of the same nature. For instance, Fassbender writes that “in the international community the constituent power lies with the ‘Peoples of the United Nations’, who today are virtually all peoples of the world, and who normally act through their governments.”²¹⁰

²⁰⁸ S. Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy* 381-407, 392, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (J.L. Dunoff et al. eds. 2009).

²⁰⁹ See e.g. V. P. Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential - Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation*, 6 *ERASMUS L. REV.* (2013).

²¹⁰ B. Fassbender, *We the Peoples of the United Nations’ Constituent Power and Constitutional Form in International Law* 269-290, 289, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (M. Loughlin et al. eds. 2008).

In Fassbender's view, the peoples are the unit that makes up the global constituent power. Fassbender believes that the national borders remain relevant at the global level and thus there is no need to look further than existing institutions and mechanisms – the national peoples and their government – to implement this new constituent power.

The peoples as the global constituent power sounds so similar to intergovernmentalism that it is worth asking whether there is any difference. Insisting on the fact that it is the domestic peoples that are members of the constituent power could be read as commanding that governments adequately represent the will of their people and thus mandating democratic practices at the state level. While we should not downplay the importance of democratization at the state level, from the point of view of global constituent power theory, the single constituent power does not lead to any major change to the current state of affairs.

C. Dual constituent power

Dual constituent power is the name generally given to models of constituent power made up of two different components. This category actually divides into two subcategories, one in which both components are truly different in nature and one in which both components are ultimately made up of the same unit.

In this scenario, the constituent power beyond the state is a mixed bag in which we find two types of members that differ in nature. So far, proposals have associated natural persons and legal persons, namely states. This is the approach adopted by Besson.

According to Besson, states may be co-members of the constituent power, along with individuals. Besson's reason for offering this model is not entirely clear. Besson starts by defining a hypothesis – that the international community would be the global constituent power – and thus restricts the scope of her inquiry ab initio. Although the concept of international community is commonly used in public international law, the precise contours and content of this community are not set. This lack of a shared definition makes it hard to “institutionalize global democracy.”²¹¹ Besson remarks that there are three main views of what the international community is. Some consider that the international community is a community of states while others believe that the international community is made up of individuals. A third view is that the international community is both a community of states and of individuals. Besson falls in that latter category.²¹² It is clear though that she does not conceive of this international community as being composed of states on the one hand, and of individuals on the other hand. She has in mind a far more complex structure that juxtaposes the community of states with

²¹¹ S. Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy* 381-407, 395 in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (J.L. Dunoff et al. eds. 2009).

²¹² *Id.* at 395.

a plurality of communities of individuals at each level of law-making, whether national, transnational, and supranational. Should be included in the decision-making process “all those whose fundamental interests are significantly affected by a decision, even when they cannot be physically present or even represented.”²¹³ She is here hinting at the idea that the interests of those who would not traditionally be allowed to take part into the decision-making process in a given community should be taken into consideration by those within the community – though she does not explain how. This is the translation at the international level of the pluralism she roots for. “The international community is not located at one level only, but it internationalizes as it were each political community at all levels of governance including national ones.”²¹⁴ There must be plurality even at the national level.

Besson argues that the constituent power is “the political community that considers itself as such and therefore constitutes itself by adopting constitutional norms.”²¹⁵ She sides with those that believe that the existence of a political collectivity precedes the exercise of constituent power. She then asks whether the international community can be considered as a constituent power under this definition. Although the international community is not a legal entity in international law, it is a legal community to the extent that its interests are shaping the law and being shaped by law.²¹⁶ Is that sufficient to

²¹³ *Id.* at 396.

²¹⁴ *Id.* at 396.

²¹⁵ *Id.* at 396.

²¹⁶ *Id.* at 396.

constitute a political community? Once again, there is not a single definition of a political community. Besson explains that “members of a political community are usually thought (1) to share common, interdependent, or reciprocal interests and goals and (2) to organize themselves autonomously to reach those goals.”²¹⁷ She believes the first prong is met in the case of the international community. States and individuals can be said to have common objectives, such as peace, or the protection of human rights.²¹⁸ However, the level of organization within the international community does not rise to the level required for a political community to emerge.²¹⁹ The existence of many international institutions and lawmaking procedures, while showing a certain level of organization, should not hide the fact that this organization is primarily by states for states, so much so that we cannot fairly say that the members of the international community have come together to constitute themselves as a political community.²²⁰ Some believe it is simply impossible for the international community to ever become a political community “because of the lack of plausibility of the political and democratic processes required for it to develop and consolidate.”²²¹ But once one abandons the model of “full and direct democratic participation” for the more realistic model of democratic participation, it becomes conceivable for an international political

²¹⁷ *Id.* at 397.

²¹⁸ *Id.* at 397.

²¹⁹ *Id.* at 399.

²²⁰ *Id.* at 398.

²²¹ *Id.* at 399.

community someday to emerge.²²² Thus for Besson, the constituent power beyond the state is in theory made up of both states and individuals but has yet to come into existence.

The single dual constituent power

The name may seem confusing but it signals both the unitary nature of this form of constituent power and the duality of the mode of participation in constituent power. Rather than a schizophrenic episode, it must be seen as one individual wearing two caps. The idea is that only individuals may be considered as holders of the constituent power but they exercise that power in various capacities.

Habermas is promoting this vision for the European Union.²²³ The constituent power belongs to individuals both in their capacity as citizens of the European Union and as citizens of a member state. Habermas explains that both components of the supranational constituent power must be seen as equals since the unit of reference in both cases is the same, namely individuals.

Peters seems to be adopting this viewpoint as well. She believes that the source of all political authority is citizens²²⁴ and places individuals at the center of her constitutional project. To her, one of the most important achievements of global constitutionalism

²²² *Id.* at 399.

²²³ J. HABERMAS, *THE CRISIS OF THE EUROPEAN UNION* (2012), 36-37.

²²⁴ A. Peters, *Dual Democracy*, 263-340, 264, in J. KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009).

should be a “fully democratized world order,”²²⁵ both at the level of states and at the global level. At the global level, however, citizens may be represented by their (democratic) state. But there must be an “individualist track,” regardless of whether states are democratic or not, that would be available to citizens so that international institutions become directly accountable to citizens. Peters sees citizens as principals, suggesting that international institutions are thus agents or representatives of citizens. This individualist track seems to be available irrespective of borders, to any and all citizens in the world.

We must note here that both Habermas and Peters talk about citizens. Citizenship is an attribute conferred upon individuals by state. This would suggest that states are somehow dictating participation of individuals at the supranational level. In the sui generis case of the European Union, citizenship at the EU level is indeed conditioned upon citizenship at the member state level. This is however a unique case and begs the question why citizenship should condition participation in the supranational constituent power.

Walker’s developments on the constituent power beyond the nation-state are more tentative. He suggests that a supranational people is the key to fixing the legitimacy deficit in the European Union. He does not identify clearly his supranational constituent power, simply noting in the context of the European Union that the draft Constitutional

²²⁵ *Id.* at 263.

Treaty seemed to lean in the direction of a dual constituent power, referring to “the citizens and states,” though it also at times, and quite confusingly, would make reference to “the peoples of Europe.” Nevertheless, he believes that the supranational constituent power derives to some extent from the various national constituent powers and thus cannot be considered completely independently from them.²²⁶ “The ‘people’ of second-order supranational understanding can never be just like the otherwise politically unencumbered and unmediated ‘people’ of our first-order state imaginary; the second-order people necessarily describes a compound structure.”²²⁷

Overall, Fassbender’s view is really the one that stands out by not recognizing the possibility of a constituent power that would be at least partially disconnected from states. All the other scholars embrace this possibility while at the same time recognizing that the nation-state is still relevant. All but Besson view the domestic peoples as participants in the constituent power. Instead she considers the states themselves as the co-constituent power.

Section 2: Mind the gaps

The emerging theories of a constituent power beyond the nation-state may be criticized for having left many gaps in their models. This may result from a tendency to take stock

²²⁶ N. Walker, Post-Constituent Constitutionalism? The Case of the European Union 247-268, 265 in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (M. Loughlin et al. ed. 2008).

²²⁷ *Id.* at 264-265.

of whatever exists (institutional arrangements and texts) and extrapolate a theory from that rather than starting with theory first.

A. Limits of the Identification method

It is important for our purposes to understand how these authors justify their view of what the global constituent power should be. Not surprisingly for lawyers, this largely depends on whether there is a constitutional text or not.

For instance, Fassbender builds his global constitutional theories on the UN Charter. He draws parallels between the drafting procedure and style of the United States Constitution and the UN Charter. The UN Charter was drafted by a convention composed of representatives of the states involved in the initiative and the UN Charter echoes the US Constitution, opening with the words “We the peoples of the United Nations.”²²⁸ But the comparison only goes so far. Indeed, the representatives at the San Francisco conference were appointed by their respective governments and not elected directly by the citizens. In addition, language that would have gone farther in establishing the peoples as the authors of the UN Charter and would have downplayed the role of states was rejected. Although Fassbender argues that global constitutionalism is different from domestic constitutionalism, his arguments in favor of considering the peoples of the United Nations as the constituent power are very similar to the ones that

²²⁸ B. Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT. (1998), 529, 573-574.

could be advanced in the domestic context. In the end, he seems to have identified the peoples of the United Nations as the constituent power because the UN Charter is proclaimed in their name, as if they were the authors. It seems that it is the people of each state that is a member of the United Nations that compose the constituent power but not a global demos comprising all the individuals from all the member states of the United Nations irrespective of borders. His approach is internationalist with a twist. At the EU level, as we have seen above, Habermas and Walker also rely on the text of the treaties as conclusive evidence of the identity of the constituent power.

As far as Besson is concerned, she did not really explain her choice. As mentioned above, she focuses her investigation from the outset on the narrow question whether the international community is the supranational constituent power. As to Peters, her vision is informed by the goal that a global constitutional order should pursue: democracy both at the global and domestic level. The democracy argument also plays a large role for those scholars focusing on the EU. The idea that the EU presents a democracy deficit is recurring and Walker, for instance, sees the involvement of the supranational constituent power as a very necessary remedy.

But for Besson's, the emerging theories of global constituent power have been thought in the context of the European Union and the United Nations, for which there are preexisting institutional arrangements and foundational texts on which to rely. On the contrary, global internet governance and many other instances of global constitutional

governance lack such a foundation. This strategy tends to divert the attention away from some difficult questions, including whether the choice of a constituent power reflected in the texts makes sense. This also raises the question how to identify a global constituent power in the absence of a text, which would arguably be most of the time given the pointillist nature of global constitutionalization.

B. Implications of pointillist constitutionalism

The pointillist nature of global constitutionalization modifies the traditional relationship between the constituent power and time. In the domestic context, the constituent power is a rather elusive creature that disappears as quickly as it appears, once it has finished “constituting.”²²⁹ But because global constitutionalization does not happen all at once but consists in a slow accretion of constitutional pieces, the constituent power is called upon on a regular basis. The multiplication of constitutional dots may easily disrupt the well-established distinction between constituent and constituted powers. The resulting blurring of the lines, far from being solely a theoretical issue for scholars who enjoy debates on the true nature of the amending power, may make it hard to

²²⁹ There is an unsettled debate in domestic constitutionalism regarding the nature of the amending power and the question whether it signifies the resurgence or remanence of the constituent power. On the one hand, it seems to be a constituted power. Indeed, the constitution usually provides for a particular amendment procedure, involving one or more of the constituted powers pursuant to special procedures. The constitution may even provide that certain clauses cannot be amended, clearly showing the subordination of the holder of the amending power to the constituent power. On the other hand, if we consider only the substance of the amending power, it could be seen as a constituent power. Indeed, its object is to partially rewrite the constitution, which task should fall on the constituent power. Thus the existence of the amending power would show that the existence of the constituent power extends beyond the constitution.

contain constituted powers, in particular states when they are co-constituent powers. Because states are involved either as co-constituent power with Besson or mediators of the constituent power, and are also constituted powers, the constraining effect of constitutionalism might be somewhat lost.

Walker does address this concern but his solution fails to convince. He explains that the role of the constituent power extends until after the constitution is adopted because constitutional legitimacy requires not only that “those who are ‘constituted’ as the subjects of constitutional authority be its ‘constituent’ authors”²³⁰ but also that the form of government resulting from the constitution effectively realize the projects, and embody the values articulated by the constituent power.²³¹ The people, by being involved in the life of the system of government created by the constitution, whether as subjects of the constitutional form, as legislators or as editors in the case of constitutional amendments, retroactively builds itself as a constituent power.²³² The people thus becomes a “reflexive interpreter,” which Walker describes as happening when “‘the people’, through public discourse, see themselves involved in a continuous project of self-government.”²³³ It is unlikely that this type of involvement of the

²³⁰ N. Walker, Post-Constituent Constitutionalism? The Case of the European Union, 247-268, 248 in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (M. Loughlin et al. ed. 2008).

²³¹ *Id.* at 248.

²³² *Id.* at 263.

²³³ *Id.* at 263.

constituent power would function as a serious constraint on the constituted powers and restore the distinction between acts of constituent power and acts of constituted power.

We might also wonder about the impact that the repeated involvement of the constituent power has over the “constituting the constituent power” debate. The constituent power is a concept that supposes unity, which leads to ask how this unity has come about. How has the will of many become the will of one, or as Klein puts it, how have we moved from “an aggregate of “I” to “we””?²³⁴ And equally importantly, when did that happen? There are two main ways of looking at this transformation process. Some authors believe that the constitution is what “constitutes” the collectivity whereas others believe that the collectivity preexists the exercise of the constituent power. Both approaches have flaws. The earlier one fails to explain how what is “essentially formless” can act.²³⁵ The latter one also fails as it seems hard to conceive of a polity whose contours are clearly and uncontroversially accepted.²³⁶ Preuss notes that this issue is not just theoretical but has practical implications, for instance in the constitutional making process in former USSR republics.

Is the constitution the manifestation of the national identity of a particular people, or is it an act of political self-organization of a civil society? Is the

²³⁴ C. Klein, *Le Pouvoir Constituant* 6-29, 17 in 3 *TRAITE DE DROIT CONSTITUTIONNEL* (Troper et al. eds. 2012).

²³⁵ A. Somek, *Constituent Power in National and Transnational Contexts*, 3 *TRANSNAT. LEGAL THEO.* (2012), 31, 35.

²³⁶ H. Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood* 9-24, 13 in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (M. Loughlin et al. eds. 2008).

constituent power of the people essentially the power of an ethnically homogeneous nation, or is it the capacity of a pluralist and diverse society to govern itself?²³⁷

With a constituent power on standby, as in the case of pointillist constitutionalization, the terms of the debate slightly change. If we were to adopt the view that the constitution creates the constituent power, in the case of a pointillist global constitutionalization, we would ask whether the constituent power is fully created only once the constitutionalization process is over (which might be never), or whether the constituent power is created concomitantly with the first dot on the constitutional canvas or whether a constituent power is created anew with every single dot. On the other hand, if we were to believe that the constituent power preexists the constitution, then we would ask whether each dot represents the exercise of a new constituent power or of the same constituent power. This in turn leads to another set of questions: could there be more than one global constituent power at any given time? If so, how do those global constituent powers relate to one another? Are they all modeled after a single general constituent power formula or are there issue-specific constituent powers?

C. Implications of states' involvement as co-constituent power

Having states as co-constituent power creates difficulties because individuals, while being co-constituent power, remain within the jurisdiction of states. This cannot be analogized with pluralist group-based constituent power at the state level, where each

²³⁷ U.K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, 14 CARDOZO L. REV. 639 (1992), 148.

component of the constituent power is on equal footing. The constituent power stands for the idea that it is the ultimate authority. How can individuals be considered as such if their co-constituent power, namely states, has authority over them (even though they are the domestic constituent power)?

In the domestic context, in theory, when the constituent power is called on to exercise its power, there is no authority that may be exercised over it since the exercise of the constituent power is itself founding the institutions of the state that could exercise any authority over such citizens. On the contrary, states as co-constituent power would be in a position to exercise power over individuals. When individuals exercise their global constituent power, are they still “within the jurisdiction” of their state? Or are they, by virtue of their participating in the global constituent power, completely removed from state jurisdiction? Does the response differ whether individuals are participating as members of the various domestic peoples or as members of the global people?

Even when states are not involved as co-constituent power, similar questions may arise. As mentioned above, in the single dual constituent power models, conditioning participation in the supranational constituent power to citizenship reintroduces states in the exercise of the constituent power. How can this be justified?

Another question is simply whether having entities other than individuals as constituent power is compatible with popular sovereignty. This distinction may not be as fundamental as it first appears. Indeed, a humanized understanding of states could

justify looking through the state veil, at the individuals that are present within the domestic borders. As a result, considering states as co-constituent power would look a lot like having domestic peoples as co-constituent power, in particular when these domestic peoples would be represented by state institutions in the exercise of their constituent power. A humanized approach to states also has the advantage of addressing the concerns regarding the heterogeneity of the constituent power. How can it act as one? How do you justify granting the same status to apparently widely different persons? States and individuals have been traditionally presented as belonging to two different legal categories from the point of view of international law.

While the continued relevance of states presents challenges, we must acknowledge that there are arguments in their favor. For Habermas, states need to continue playing a role as they are guarantors of freedom. As to Walker, he believes that the global constituent power is unable to participate directly in the constituting process and needs to be mediated. These are important considerations to take into account.

D. Mediation by states

Mediation or no mediation, that is the question. Somek answers with a resounding no. “[I]t would be misleading to speak of a constituent power in a context where ordinary people are mediated by their governments, for this would rob the concept of its radically

democratic core.”²³⁸ Does this exclude all forms of mediation or only mediation via states? Scholars here have embraced mediation without giving it much thought. If states are democratic, they should in theory represent their citizens and act in their interests.

A case in point is the UN Charter as analyzed by Fassbender. As he pointed out, each state sent officials to the drafting meetings. The people in each state indirectly weighed in on the position adopted by such officials by choosing a head of state or government, who in turn selected such officials and defined the position they had to support. Thus the involvement of the people was likely to have been prior to the constitutional dot-making, on issues unrelated to the constitutional dot-making. It differs from the situation in which the constituent power acts directly, as we can see in the domestic context where the procedure may vary from country to country. For instance, the constituent power acts through a specially-elected convention in the US. France followed a different pattern for its 1958 constitution, which was adopted by the French people by referendum. These procedures can be said to be direct or unfettered because the people decides whether they support or not a finished project. There is a direct causal link between the vote they cast and the final result of either adoption or rejection of the constitutional proposal. On the contrary, in the mediation model, and assuming a democratic state, the causation is indirect since many intervening factors will come

²³⁸ A. Somek, *Constituent Power in National and Transnational Contexts*, 3 TRANSNAT. LEGAL THEO. (2012), 31, 48.

into consideration. The people votes for representatives who will then decide to act a certain way based on many considerations, whether values or self-interest, among many others.

E. Implications of accidental constitutionalization

A side-effect of the phenomenon of accidental constitutionalization is the constituent power's awareness (or lack thereof) that it is engaging in constitution-making activity. The question boils down to this: can the global constituent power be involved without even knowing it? This question brings us back to the *raison d'être* of the constituent power, namely consent. The consent of the constituent power is the key to democratic legitimacy. Consent should not be inadvertent, should it? While law provides that silence means acceptance in specific circumstances, it would seem hard to be satisfied with such a passive role for the constituent power in such crucial times.

If we look at Ackerman's theory of constitutional moments, that is to say constitutional changes that fail to follow the constitution's amendment procedure and are nevertheless legitimate, we see that constitutional moments require a certain degree of openness. To qualify as a constitutional moment, Ackerman argues that a change in the constitution has to follow a certain procedure, including a proposal, followed by a public debate, followed by ratification and finally the consolidation by the People.²³⁹ Even though there is no formal consent, the constituent power is given ample opportunity to debate

²³⁹ B. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), 266-288.

the modification and engage. This seems to be somewhere in between the act of actively consenting on the one hand and the act of not opposing on the other hand.

F. Absence of a global constituent power formula

The scholars herein reviewed all believe that the constituent power belongs to individuals, save for Besson who believes that states should be co-constituent power. A popular constituent power fits in nicely with the vision of constitutionalism as a toolkit to ensure democratic legitimacy and it is understandable that these authors feel that they do not have to provide support for this view.

But it remains that Besson falls back on the well-known notion of international community to justify the status of states as co-constituent power, without explaining why in the first place she decided that the international community was her candidate for global constituent power. Walker, Habermas and Fassbender, for their part, rely on the text of the draft Constitutional Treaty and of the UN Charter, respectively. As we have seen above, the problem with the purely textual approach is that it seems to take at face-value whatever is written down in the documents identified as having constitutional value. It seems to be giving credit to the rather reductionist view that holds that the constituent power is whomever is mentioned in the constitution. But the constituent power actually needs to be involved. There is a need for a more theorized test to determine the identity of the global constituent power, and in particular the role of states. Are they co-constituent power or mere agents?

This chapter has shown that existing literature on the global constituent power is scarce and has left many questions unanswered. Global constitutionalism and global internet governance may be said to be evolving along a similar path in at least one respect. They both are in search of an author. In the next chapter, I lay out my vision of the global constituent power, which builds on the emerging literature on the constituent power beyond the nation state and tries to address the set of fundamental questions that I have outlined above in an effort to paint a more thorough portrait of the global constituent power.

CHAPTER 5: THE COMPOSITE GLOBAL CONSTITUENT POWER MODEL

My contribution to the emerging literature on the global constituent power is two-fold. It relates first of all to the composition of the constituent power and builds on an insight from federalism (section 1). It also addresses the question of the exercise of the constituent power beyond the state as this is intimately connected to the identity of the constituent power (section 2).

Section 1: Identity of the constituent power beyond the nation-state

In this section, I detail the strategy I have adopted to build a global constituent power model, from discussing the assumptions that underlie the model, or the inspiration drawn from federalism to justifying the co-existence of a state element and a global element within the global constituent power.

A. A review of assumptions

At the outset, it is worth reemphasizing the assumptions that are underlying this model. Constitutional governance happens in multiple sites, at the level of the nation-state and beyond, and will happen in such a manner in the foreseeable future. I do not advocate either for a world government that would do away with states or for a purely intergovernmental system for addressing supranational issues. At the domestic level, it is easy to identify constitutional governance. All the countries in the world have adopted constitutions. Written constitutions are the most common. A few countries have

unwritten constitutions, like the UK, but the existence and the content of the constitution are readily ascertainable. Beyond the nation-state, however, constitutional governance takes the more hidden form of pointillist constitutionalization. As we have defined in Chapter 4, constitutionalization has two components: a substantive component and a procedural component. Substantively, constitutionalization means the introduction of norms enabling and constraining the day-to-day governing of individuals. Procedurally, constitutionalization requires the intervention of the constituent power. Another crucial assumption is that constitutionalism, whether domestic or global, places popular sovereignty at its center. This leads to conclude that individuals are making up the global constituent power, to the exclusion of states or other entities.

Briefly put, our world today comprises well established sites of constitutional governance – states – and emerging sites of constitutional governance beyond the state. With self-government of individuals being at the heart of the constitutional project, whether at the domestic level or beyond, this multiplicity of constitutional governance sites suggests the existence of multiple coexisting constituent powers. At any given point in time, each constituent power must be given appropriate consideration. Dissociating levels of governance must be avoided as it would lead to favoring one constituent power over the other, which is what has tended to happen until now, the

global constituent power appearing as an afterthought. This is key to understanding the constituent power beyond the state.

Self-government also suggests that, as the source of all power, the constituent power should exhibit certain characteristics. In particular, it should be active, as opposed to passive, and explicit and conscious, as opposed to implicit.

B. Constituent powers and federalism

Coordination among constituent powers is a feat that federalism is no stranger to. In federal states, there coexist a federal constituent power alongside state constituent powers. The dynamic between these constituent powers is created at the time the federal constitution is adopted. In the case of states coming together within the framework of a federal state, which case can be approximated to globalization, the mechanism is as follows: the preexisting constituent power of each of the soon-to-be federated states accepts that its government will be bound by a federal constitution adopted by the federal constituent power, of which they constitute a part only.

If we look at the American Constitution for instance, we can see that this step is conflated with the adoption of the federal constitution itself, making it an interesting moment when both federal and state constituent powers are involved simultaneously. The domestic constituent powers agree to this new governance arrangement, which results in a transfer of competences to the federal level, while the federal constituent power – acting as “We the people” - agrees to the new federal constitution.

C. Transposition beyond the nation-state: the case for a state component

The takeaway from federalism is that each global constitutional dot-making must be understood as constituting both the act of the global constituent power who engages in global constitutionalization, as well as the consent of the domestic constituent powers to commit to global constitutional governance. However, unlike what is found at the domestic level, the constitutional moment is only one dot among many others, rather than a broad constitutional plan that lays out comprehensive rules designed to apply to any and all issues for the foreseeable future. In pointillist constitutionalism, on the contrary, decision-making is narrowly focused on one set of issues, if not a single issue. Thus the domestic constituent powers cannot be said to have accepted to share competences with the global constituent power beyond the particular issue at stake. The domestic constituent power has no visibility, no expectation regarding what future constitutional dot-making moments will look like. As a result, the domestic constituent powers must be involved again and again every time the global constituent power is called on to make decisions on new sets of issues.

At this stage the question becomes how to ensure the continued involvement of the domestic constituent powers in global constitutionalism. A possibility would be to offer the domestic constituent powers the option to independently consent, followed by the intervention of the global constituent power. Taking a cue from federalism, we can see that it is possible to combine both steps to ease the burden that such a procedure would

constitute. In the case of the United States, it was possible because the federal constituent power consisted in the sum of all state constituent powers. The federal constitution was indeed ratified by specially elected conventions in each of the states. At the moment the required number of state ratifications was obtained, the state constituent powers that had approved the text of the federal constitution jointly became the federal constituent power. But in the case of the global constituent power, this cannot be, for the global constituent power is not the sum of all domestic constituent powers, as we shall now see.

D. Common experience regardless of citizenship: the case for a borderless component

Following the example of US federalism, among others, we could argue that the global constituent power should consist in the sum of all domestic constituent powers. However, seeing individuals exclusively through the state lens amounts to reducing their identity to their citizenship, and dividing their interests and beliefs along state lines only. It denies the common core, the humanity that is shared by individuals regardless of one's passport number. Global constitutionalism builds on the fact that more and more governance of a constitutional nature happens beyond the nation-state. This means that individuals are exposed to the same constitutional governance regardless of their state of origin. In those circumstances, it seems contradictory and counterfactual to retain solely a state prism for the global constituent power. While their citizenship might to some extent inform their views and beliefs, individuals will form their opinions based

on a wide range of factors. The global constituent power becomes disconnected from citizenship and revolves around the notion of humanity. By freeing individuals from state borders, we are giving them a chance to be more than just about their state. This opens the door to a richer understanding of individuals' global identity.

In addition, disconnecting the constituent power from the state helps regain some of its authenticity by taking citizenship out of the equation. At the domestic level, exercise of the constituent power by individuals is constrained by rules, whether regarding citizenship or voting rights. This does not sit well with the theory that the state is a creation of the constituent power and thus citizenship and other restrictions of the right to exercise constituent power, some of the state's creations, cannot predate the constituent power. This paradox makes it difficult to approve of practices that subordinate participation in the constituent power to citizenship (which would typically be the case with referenda or special representation) among others.

On the other hand, disconnecting the global component from the state raises doubts as to its ability to unite and act as a collective. The constituent power, while made up of individuals, acts as one. The ability to act collectively has raised a lot of theoretical issues, such as what creates this sense of collectiveness. At the global level, many have denied the possibility of collective action because of the absence of a global demos. However, as I shall explain below in Chapter 6, there is no agreed upon definition of the concept and depending on the definition, it might be possible to discern the

existence of a global demos. Furthermore, we may not even need a global demos in the first place. The brand of global constitutionalism that I favor does not aim for the establishment of a world state. It is to some extent less ambitious and is not trying to govern all aspects of life, leaving most of that to be decided locally. Instead it focuses on global issues (environment, internet) or questions that arise out of humanity (human rights for instance). The global component of the global constituent power is there precisely because individuals have a lot in common regardless of their citizenship. Globalization expands the range of such interests. The same phenomena can be witnessed throughout the world, exposing individuals across and irrespective of borders, to the same issues. In addition, regardless of recent globalizing trends, there is the notion that humanity, or the human condition, is a sufficient enough common core when it comes to the most fundamental issues. The subsidiarity of global constitutionalism, coupled with its pointillist nature, means that if the intensity of the collective action is similar to that encountered at the domestic level, the scope is narrower. This in turn suggests that the collectiveness should also be narrower in scope, making it easier to obtain.

The sense of belonging to a collectiveness flows from participation in common projects, from time spent together debating – and agreeing - on specific issues, all things that a more deliberative process would foster. Unity does not need to mean identity of beliefs,

of experience or of culture. Unity would be a gradually developing feeling that is associated with the act of participating in a shared project.

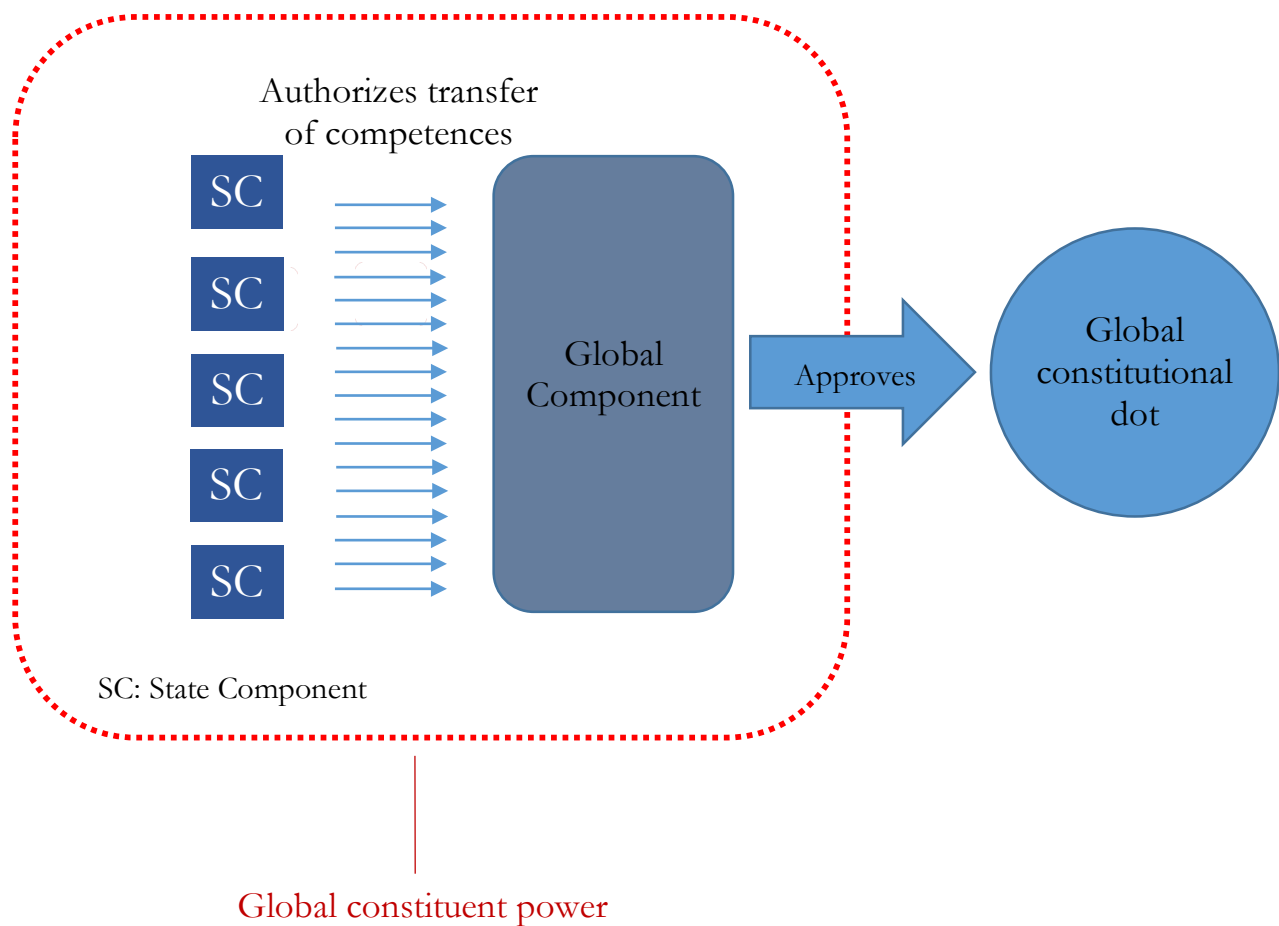


Figure 2: The composite global constituent power model

To summarize, the global constituent power is composed of two components: a state component and a global borderless component that act side-by-side. The state component will represent the involvement of the domestic constituent power that needs to agree to the transfer of powers to the global level. The existence of the state dimension within the global constituent power is explained by the fact that states remain primary site of governance and that we need to reconcile the global with the local. The state element of the global constituent power should not be seen as diminishing its global nature but rather as bolstering its legitimacy by ensuring self-government for individuals. Alongside the state component is the global component, that is made up of individuals regardless of their citizenship. This combination not only permits coordination among sites of constitutional governance and ensures concomitant self-government by individuals at the domestic and global levels, but also strengthens forms of identity that do not revolve around citizenship.

One may ask whether a global constituent power made up of a borderless global component and a state component is not better seen as two constituent powers joining forces rather than a single constituent power. We should note that it would be difficult to justify the existence of a purely global constituent power. While the domestic constituent powers have a purpose, aside from acting at the global level, the borderless global constituent power would never act on its own (because of the premise that a state element is necessary to enable the borderless global constituent power), making it

a powerless constituent power. This impossibility to act on its own is contrary to the notion of constituent power. Thus we must look at the global constituent power as a single constituent power made up of these two elements that work hand in hand.

Section 2: Exercise of the constituent power beyond the nation-state

Having identified the need for both a state component and a borderless global component within the global constituent power, it is now time to explore in more details how this global constituent power actually acts. There is not a single option but rather several options for each of the state element and the global element to exercise their power that may be combined.

A. Common features

As usual, the starting point here is self-government. The constituent power must consent to the constitutional dot so the exercise of the constituent power must be tailored to reach that goal. In practice, this means that the involvement of the constituent power must be specific. Specificity refers both to the definition of the constitutional question on which the constituent power must weigh in and to the impact of the members of the constituent power – individuals - on the decision being made. There must be a plausible connection between the constitutional dot and the constituent power that is its source. We should note that specificity prescribes a certain timing of the involvement of the constituent power. We cannot expect the constituent power to participate in a specific manner if we are too far removed in time from the

constitutional dot-making. Conversely, the closer in time we are from the constitutional dot-making, the more likely it is that the constituent power's involvement will be specific.

Note here that we are talking specifically about the consent stage in the constitutionalization process and not about the drafting stage. Getting the constituent power involved at the time of drafting is not a theoretical necessity but a practical one. Obtaining consent is more likely if people have been involved ahead of the decision, in line with deliberative democracy principles.

B. State component

The way the state component of the composite global constituent power may be exercised will depend on how it is analyzed. On the one hand, the exercise of the global constituent power could be seen as an amendment to the existing domestic constitution. I have explained above that ensuring popular sovereignty in the exercise of the global constituent power required that domestic constituent powers gave their consent. Exercises of the global constituent power typically result in either a transfer of competence to the supranational level or the introduction of limits on state powers. This type of modification clearly qualifies as a constitutional amendment at the domestic level. On the other hand, the exercise of the global constituent power, while requiring the participation of the domestic constituent power, is of a different nature. It is the combination of both the state component and the global component that make

up the global constituent power. Hence its name, the composite global constituent power. If it starts out as an individual exercise of domestic constituent power, it merges with and morphs into the global constituent power the moment the global component and the state component agree to a constitutional dot.

Adopting the latter approach means that the exercise of the state component is not constrained by the procedures for constitutional amendments provided for in domestic constitutions. While these procedures are definitely available, it is possible to think outside the box and offer novel modes of exercise of the state component.

Constitutional amendment procedures

Constitutions tend to be designed so as not to be too easily amended and provide for relatively cumbersome procedures. There are three main ways in which domestic constitutional amendments are usually adopted.

Unfettered direct action

Unfettered direct action is, from a theoretical point of view, the most ideal case. The constituent power expresses itself without any intermediary – though its expression is channeled by a procedure. The typical example would be a referendum on a specific issue or text.

Special representation

This form of representation is “special” as it is established specifically for a constitutional amendment, in our case a global constitutional dot-making purpose, as

opposed to general-purpose forms of representation (parliament for instance). Ratifying conventions are a common example of special representation. At the global level, the proliferation of constitutional dot-making moments might make it cumbersome to hold elections every single time. We could conceive of specially elected representatives competent for a limited set of issues rather than a single global constitutional dot.

Ordinary representation with a twist

Another commonplace procedure for amending constitutions consists in relying on existing institutions. For instance, parliaments may be able to adopt amendments by a qualified majority vote. Occasionally, additional formal requirements are added. In France, it is required that both chambers of parliament meet in Versailles, the seat of the French monarchy since Louis XIV, to vote on a constitutional amendment.²⁴⁰ This method should not be used to exercise the state component as it does not meet the specificity requirement. The individuals making the decisions are too removed from the state component as they have not been selected for a specific constitutional purpose.

Outside the box: the state as agent

Another avenue that would not be governed by constitutional amendment procedures is available: exercise of the constituent power by states acting as agents of the state component. The specificity requirement mentioned above precludes the state from acting as agent of the constituent power simply by virtue of the constituent power

²⁴⁰ Constitution de la République Française, 4 October 1958, Article 89.

having created the state. Indeed, the act founding the agency relationship – the act of constituting – would look more like a blank check than a specific instruction on how to approach particular constitutional dot-making. In addition, the possibility that the constituent power does not even survive the act of constituting – a point debated in the literature - makes agency based on the act of constituting even less likely. The disappearance of the constituent power as principal would extinguish any agency relationship with the state. Nevertheless, specificity does not completely preclude states from acting as agents of the state component. In specific circumstances, states may rightly be deemed the agents of the state component. I will look at them briefly.

Constituent power boosters

We have established that the state cannot be considered as the agent of the constituent power simply by virtue of the constituent power having created the state. The state in this case would be lacking the necessary direct connection to the constituent power. The agency relationship needs to be supplemented by boosters, that is to say injections of constituent power that reactivate the connection and accountability between the agent and the principal and ensure that the will of the constituent power is the one that rules, thereby meeting the specificity requirement in both its meanings. Unlike referenda and special representation, practices qualifying as boosters are not formal, which makes them harder to pinpoint. A booster of the state element will logically be found within state borders. The challenge here is to ensure that booster phenomena or practices are

representative of the constituent power despite their informality. Let us review potential candidates.

Social movements

Social movements, understood as individuals acting – usually protesting - together to effect social change, could be seen as a manifestation of the constituent power. They indeed represent the idea of a collective and of action, two qualities of the constituent power. Social movements can be said to be specific to the extent that they usually emerge in response to a specific issue. However, social movements do not always change the government's policy, including for legitimacy reasons. Unlike social movements, governments usually enjoy democratic legitimacy through free and fair elections. How representative are social movements? How do we ascertain that the view put forward is really that of the constituent power? We could derive the representativeness of social movements as constituent power from the lack of opposition to the same, or the lack of equal or greater opposition. In other words, the lack of opposition to the opposition would signify acceptance of the opposition. By definition, the constituent power is free at any point in time to resurface to establish a new order if the old one is no longer satisfactory. Thus it could be argued that its silence means its acceptance. On the other hand, why would we more readily construe such silence as support for the opposition as opposed to support for the government? Furthermore, this negative approach misconstrues the nature of the constituent power,

which exists through its actions, whose existence is verified by its actions – the doubt is always present what its absence truly signifies. Thus social movements hardly seem to constitute an appropriate constituent power booster.

Non-state actors

What about non-state actors, in particular civil society organizations? They could be seen as channeling the interests of individuals all the way to the government and could negotiate with the government, whenever needed, to arrive at a mutually agreeable position. Negotiation here would be the key to the legitimacy of the arrangement. This would build on principles of deliberative democracy, which seeks to expand public participation in the decision-making process beyond the act of voting. But for this to work as a constituent power booster, individuals must be confident that their voice has been heard. This would require government to commit to and organize genuine and transparent deliberations involving all non-state actors that are interested in participating.

Public comments

Another potential constituent booster could be public consultations preceded by a media campaign to alert individuals of the upcoming constitutional dot-making. This would present the advantage of not filtering the voice of individuals and would mobilize civil society organizations, encouraging them to contribute to the debate. This option may not be reduced to reliance on public opinion. Public opinion can be considered as

an ersatz of constituent power, a powerless constituent power. The specificity requirement, in particular the control over the outcome, may not be fulfilled. Public opinion does not predictably sway the government's policy and thus does not meet the specificity requirement.

This form of involvement of the general public in constitutional matters has been developing, thanks to new technologies. We have seen most recently the example of Iceland, that has experimented with constitutional crowdsourcing.²⁴¹ It is likely that new modes of participation in decision-making may appear in the future creating new opportunities for participation.

In this part, I have outlined the various paths that the state component of the composite global constituent power can take, from the most direct to the least direct form of action. In the latter case, the need arises for a constituent power booster to ensure that the connection between the domestic constituent power and its agent, the state, remains tight. I have mentioned a few possible – imperfect - boosters. The challenge lies in their informality, which constitutes a hurdle to ensuring adequate representation.

C. Global component

When it comes to the global component of the global constituent power, the question of its exercise turns mostly on the practicality of mobilizing such a large group of

²⁴¹ See e.g. H. Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 J. OF PHILOSOPHY (2014), 166.

people. We can conceive of a continuum of acceptable practices, from the more direct to the less direct form of action, from the more formal to the less formal. The main requirement is that the mode of exercise must result in decisions that embody the will of the global component.

This requirement prevents reliance on an assembly of states or on traditional international organizations. We could have imagined the creation of an assembly of states that would make decisions on global constitutional dots, possibly modelled after the UN General Assembly that some occasionally compare to a world parliament. The state representatives could either have been state officials or have been directly elected by citizens in their respective countries. However, the main issue with this solution is that it would negate the very existence of a global component. I have argued earlier that the global component of the global constituent power is essential as it reflects the fact that there is a common core of issues that affect individuals all over the world in a similar fashion regardless of their geographic location. This indicates that there is a global demos, even if to a significantly lesser extent than the common core that cements domestic constituent powers. The global demos needs to fully express itself regardless of borders. Having recourse to an assembly of states would do just the opposite.

Similarly, traditional international organizations are not structured in such a way as to reflect the will of the global component of the global constituent power. They follow the intergovernmental model and provide individuals with very little access to decision-

making processes. Thus the outcome of the decision-making process in traditional international organizations is a compromise found among the will of the various states rather than the will of individuals across the world. Furthermore, many international organizations do not have a membership that covers the whole world. While the United Nations is one of the few organizations that has quasi universal membership of states, individuals have little access to the UN agencies, certainly not on a regular basis or as a matter of course. This option cannot be considered. Let's now turn to methods that truly enable the global component.

Unfettered direct action and special representation

Just like for the state component, unfettered direct action, for instance through the organization of referenda, or special representation, through the election of special dedicated representatives, are both available options in theory. Practically speaking, both unfettered direct action and special representation seem equally unlikely. They would require a global electoral campaign and the introduction of a worldwide voting system. Not even addressing practical concerns such as financing of the elections, we can see that these theoretical answers would likely fail at the implementation phase (see below Chapter 6). However, new forms of involvement of the general public in constitutional matters have been developing, relying on new technologies. As I have mentioned above, Iceland has experimented with constitutional crowdsourcing.²⁴² It is

²⁴² See e.g. H. Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 J. OF PHILOSOPHY (2014), 166.

likely that modes of participation of individuals in decision-making may evolve with progress in technology and that new possibilities will emerge in the near future.

Mediation

Against this background, mediation of the global component must be taken seriously. There is no obvious candidate here since we do not have a world state that could potentially fulfill this role. Thus the mediator has to be found somewhere else. It seems difficult to find a single candidate that would span the whole world of individuals while at the same time provide easy access to individuals to ensure they really are the decision-makers. Such mediator could also reignite the fears of hegemony of the opponents to global constitutionalism.

Following the lead of internet governance, we could think of non-state actors as candidates. The aim would be to entrust non-state actors with the difficult task of channeling all the various interests and opinions that the general population may have. This would build on principles of deliberative democracy, which seeks to expand public participation in the decision-making process. The motto would be the more diversity the better, hoping that a balanced solution would be found. The possibility of non-state actors as mediating the global element of the global constituent power, however, raises various issues.

Which non-state actors? Global scope requirement

The non-state actor category almost seems like a sweeping rug. Any entity that is not a state or related to a state should qualify as a non-state actor. One may ask whether individuals can be non-state actors. While in theory it would seem possible, individuals are not commonly included as such in this category. The concept of non-state actors comes from international relations and has been used to describe new forms of power in the international system that have been enjoying some legitimacy independently of states. An individual alone would rarely have authority in this sense. Commonly cited examples are global market forces, private market institutions engaged in the setting of international standards, human rights and environmental non-governmental organizations, transnational religious movements, or even mafia and mercenary armies.²⁴³

What is the value of relying on this concept? First of all, we shall underline the fact that the goal here is to offer mediation for the global element of the global constituent power while meeting the specificity requirement. Because the global constituent power has a state component, we do not want to duplicate it and thus require a global component to be truly global. Relying on entities that are disconnected from states is the first step in this direction. This requirement raises interesting issues. What is truly global? Would a national NGO be allowed? Lack of financial means for instance could explain that a

²⁴³ R. B. HALL & T. BIERSTEKER, *THE EMERGENCE OF PRIVATE AUTHORITY* (2002), 4.

particular group's reach remains circumscribed to one country. Could we require them instead to adhere to a transnational network? What if a group has such a unique take on issues that it cannot be part of a transnational network? Should particularized interests be ignored?

Second of all, the vagueness of the concept of non-state actors is a positive attribute and should be embraced. It is actually the key to representativeness. This is surprising, if not downright paradoxical. How can we establish representativeness if we do not know who is participating? Because we are situated at the global level, in the absence of a world state, representativeness plays out differently. It is difficult to set objective criteria to evaluate representativeness – numerical or otherwise – because of the lack of structure. Actually, one may even wonder who would be entitled to check whether criteria are met or not. Representativeness is a major concern precisely because of the necessary informality of the practice. Vagueness here presents the great advantage of enabling inclusiveness. It is compatible with a bottom-up process by giving the constituent power the ability to act in a more organic unfiltered fashion. This principle of inclusiveness simply means that all non-state actors are allowed to participate. There is an open invitation for participation.

Does this mean there is no prerequisite for participation? Are all non-state actors equally entitled to participate? The answer has to be yes. All non-state actors are legitimate. Legitimacy should not be thought of entity by entity but as a whole. Legitimacy will

come from the fact that all individuals, through non-state actors, are able to voice their opinion. Evaluating legitimacy at the level of each entity would amount to restricting the expression of particular opinions. We are less concerned by the content of the opinions that are being raised than by the fact that these opinions are being raised. This is a better reflection of the diversity of opinions among individuals from all over the globe and who together constitute the global component of the global constituent power. The main concern is to create the conditions for a decision to be made after all interested parties have been given the opportunity to participate and express their opinions. This is in line with deliberative democracy, which stands for the fact that democracy cannot be reduced to a vote. It requires more from citizens, including their informed and active participation ahead of what is usually a vote. This requires a systemic evaluation of legitimacy and representativeness, as opposed to an itemized evaluation.

What if powerful individuals were to create many such non-state actors so as to control the process or unduly influence outcomes? Just like there is a risk of overrepresentation of certain groups, there are obvious risks of underrepresentation of certain groups. If anything, money issues among others might make participation of groups from economically less developed regions of the world harder. These concerns however do not stem from the composition of the global component of the constituent power and

are better seen as an implementation issue that can be addressed by a careful choice of decision-making procedures.

The question arises whether the inclusiveness principle knows of any limits. Can we exclude any group? If so, on which basis? To take a rather extreme (and possibly unrealistic) example, we can ask whether terrorists groups, which are commonly included in the non-state actor category, belong to the global element or not. While the instinctive answer is likely to be no, a reasoned answer needs to elaborate on the notion of lawfulness. Because we do not want to duplicate the state component, the shape of the global component should not be conditioned upon states. This excludes criteria such as lawful purpose or legal personality that are bestowed by states or by reference to states. Because we cannot rely on states' conception of lawfulness, we need to find a global definition of lawfulness. There is a body of international law that could be relied on to exclude terrorist groups from the global component. But this raises a host of other issues, not least among them the question whether the constituent power may be bound by any law. Such laws would not be self-enforcing and thus would require the involvement of a court. Once again, would that be compatible with the exercise of the constituent power? The domestic constituent power is de facto bound by domestic laws that regulate such things as who is entitled to vote. That would tend to show that the global component may similarly be constrained by international laws. Alternatively, we

could introduce full openness and rely on deliberation to ensure outcomes that are compatible with the values associated with global constitutionalism.

Because there is no selection of the non-state actors, there will be overlaps and redundancies, and in all likelihood gaps. An individual may feel that several non-state actors represent his or her interests, thereby fully expressing the complexity of individuals' identity. Individuals do not have just one defining feature but often feel pulled in various, and sometimes opposite, directions. The absence of selection of non-state actors means that individuals in all their complexity can be represented. This also decreases the risk of communitarization that would result from individuals being each represented or at least mediated by a single entity. Individuals do not have to choose and can participate through as many groups as they deem appropriate, fully expressing the richness of their identity. This should also incidentally promote dialogue. If the same individuals are members of several groups, then those groups might recognize a common core more readily than otherwise. Once again, inclusiveness might work towards better communication and more trust.

Non-state actors thus will be any entity, whether or not formally organized, that may claim to be the voice of a group of individuals. Non-governmental organizations or religious groups would be likely candidates. But what about the private sector? Whose interests do corporations represent? This takes us back to some extent to the origins of multistakeholderism and the understanding of corporations as a place where the often

conflicting interests of a plurality of stakeholders converge and are processed – that of employees, customers, shareholders, subcontractors, suppliers, among others. In this broad understanding of the corporation as being more than the exclusive instrument of the shareholders, corporations can be seen as representing a plurality of interests. Actually, all groups represent a plurality of interests. It would be a rare case when all the members of the group believe and think exactly alike. Instead, groups' opinions result from the confrontation of the diverging ideas of members. The voice of every group is already a mashup. The question thus becomes whether mashups can sufficiently be traced back to individuals so as to be representative of them or not. It seems that the answer depends on how the mashup is arrived at. With some exceptions, we may believe that members who would disagree with a decision made by the group would simply elect to leave the group and find or even found a more suitable one. This rationale of implicit support is often advanced as a (rather unsatisfactory) way to solve the intra-generational conflict in domestic constitutionalism, as we shall see below in Chapter 6. In this case, it might work better since the cost of exit is low compared to the cost of exiting one's country.

[Access and connection: specificity requirement](#)

Access by individuals to non-state actors is usually easier than participation in domestic political systems. For instance, it is easier to become a member of an NGO than a citizen of a country (generally that is, unless you are really rich or really athletic). Thus

participation could in theory be broader and more inclusive. At the domestic level, citizenship constitutes the main obstacle preventing many from effective participation into the exercise of the constituent power, when it relies on unfettered action or special representation. The global element of the global constituent power is free from citizenship concerns. Participation is available to all.

How do we ensure that individuals feel that there is a direct connection between the ultimate decision and their own opinion? They must understand – and trust – the making of the decision. The importance of allowing all to participate and the importance of articulating the rationales underlying decisions cannot be overstated. The decision-making process must be designed with this concern in mind. At least two main approaches are conceivable. Either a structured decision-making process, relying on a pyramidal structure or, on the contrary, a spontaneous expression of opinion by interested parties.

Structured decision-making requires that someone be in charge of structuring. Issues of constitutional governance usually will fall within the jurisdiction of an international organization or supranational entity of some kind. One need only to look at the list of international organizations, for instance, to discover that many issues that are under the radar of even well-informed people have their own dedicated organization. These organizations could take the lead in structuring the decision-making. International organizations, by definition, have an international membership that could be relied on

to reach out globally to individuals. It would however be imperative that the organizing organization not turn into a gatekeeper. Imposing certain procedures for participation might end up excluding some from the process.

The case may also arise where several organizations are candidates for leading the decision-making. A possible way to structure the decision-making would be by introducing a pyramidal process, with the organization of many local meetings, that would feed into regional meetings, that would feed into global meetings, where the final decision would be made. The possibility of this bottom-up process to be followed by a top-down process could be explored. The top-down process would be meant to ensure that the decision reached at the global level does not ignore views expressed at the most local level by a substantial number of people.

At the other end of the spectrum, we could conceive of a spontaneous movement leading to the emergence of a shared decision. This would be very similar to a social movement. Practically, it seems unlikely that this would happen globally. Without anyone being assigned the duty to convene and organize, we may also doubt whether all global constitutional dots would receive any attention. Let us not forget that though constitutional governance, by definition, deals with issues of the utmost importance, it does not mean that mobilization would reflect the importance of a particular issue. Highly technical issues, for instance, might stay under the radar of many, creating

orphan global constitutional dots. It would also be difficult to decide when a decision has been reached.

D. Majority vs. unanimity

Domestic constitutionalism has been struggling with justifying its reliance on the majority rule in constituent power matters. How will this affect the global constituent power? Let us look at each component in turn before looking at their articulation.

Within the domestic component, we need to distinguish further. Within each state, unfettered and special representation will follow traditional procedures and thus rely on majority rule. The same goes when states act as agents. Because mediation happens through the state and the state, assumed to be democratic, does represent the majority of individuals, there is a majoritarian support albeit not specific to the constitutional moment at stake. The boosters are there to reactivate this majoritarian support. Though it does not entail a vote, state mediation still has a majority underpinning.

At the level of the domestic component, which aggregates all domestic constituent powers, do we follow unanimity or majority rule? There is a dilemma here. On the one hand, as I have explained earlier, global constitutionalism justifies the fact that certain norms of international law bind states that have not consented to them. This would support the majority rule. On the other hand, not requiring unanimity means that certain domestic constituent powers may choose not to consent to the delegation of

competence to the global constituent power. What happens then? Does it jeopardize the global constitutional dot-making?

A domestic constituent power that has refused delegation of power cannot be deemed to be bound by decisions adopted by the global constituent power. This statement seems to contradict one of the key narratives associated with global constitutionalism, namely that it explains how states may be bound even when they have not consented. However, we should not forget that when it comes to global constitutional dot-making, it is not states' consent that matters – but the state component's. The distinction is crucial. States do not hold the constituent power – individuals do. Indeed, it may very well be the case that states, understood as real persons, may want to reject a particular constitutional dot that the corresponding domestic constituent powers, exercising their powers in accordance with the procedures outlined above, choose to embrace.

Within the global component, unfettered action and special representation, if they ever were implemented, would likely rely on the majority rule as well. As for the case of mediation via non-state actors, the informality of the practice requires consensus. It would not be possible to define a majority because of the necessary vagueness and openness of the process.

The relationship between both elements of the global constituent power flows naturally from their respective roles. Both elements of the global constituent power have a different role and we cannot do without either of them. We need both. Thus both need

to consent for a constitutional dot-making to happen. We need the consent of the state component to establish the delegation of power. Then the global element needs to reach a consensus on the substance of the constitutional dot-making. Only if we have both can we say that we have a global constitutional dot.

It is because of these distinct but complementary roles that we require unanimity. Habermas argued that unanimity was necessary because both components of his dual constituent power were made up of the same unit: individuals. But this disregards the fact that by treating each component equally, we de facto institute inequality between the weight of an individual as part of the global component and the weight of the same individual as part of the domestic component. Thus justifying unanimity by focusing on the fact that the unit of reference is the same is not as strong an argument as might seem.

In this chapter, I have outlined a model for a composite global constituent power model, one that aims to increase the legitimacy of global constitutionalism by securing the consent of the governed while at the same time avoiding the hegemonic fears of some critics. Koskenniemi for instance wrote that

[t]he agreement that some norms simply must be superior to other norms is not reflected in any consensus in regard to who should have a final say on this. The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a *pouvoir* constituent but because if such presented itself, it would be empire, and the

constitution it would enact would not be one of an international but an imperial realm.²⁴⁴

The unanimity requirement combined with the shared role of the domestic and global peoples as constituent power should alleviate some of Koskenniemi's concerns. However, I do not mean to say that the composite global constituent power model is unimpeachable. In the next chapter, I will provide an overview of the limits of the model.

²⁴⁴ M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. (2007), 19.

CHAPTER 6: SOME LIMITS OF THE COMPOSITE GLOBAL CONSTITUENT POWER MODEL

In this chapter, I am discussing the limits to the composite global constituent power model. I first compare it to the other global constituent power theories described earlier in Chapter 4 and observe that it addresses most, but not all, the gaps I had identified in the existing literature (Section 1). I then discuss the limits inherent to my choice of international law theory, namely global constitutionalism (Section 2). I finally point out the practical obstacles that the implementation of the composite global constituent power would face (Section 3).

[Section 1: A solution to many gaps in the existing global constituent power literature](#)

In Chapter 4, I described the current literature on the global constituent power and highlighted some missing pieces in those emerging theories of global constituent power. In this section, I assess the composite global constituent power model in light of those missing pieces.

The first limit identified in the existing literature related to the method of identification of the global constituent power. In particular, I criticized the exclusive reliance of the emerging theories of global constituent power on textual sources or preexisting notions such as the international community and called for a reasoned standalone framework, lest the global constituent power just become another more respectable name for what

is already in place. The composite global constituent power model is a model that does not begin with texts. Instead, it starts by identifying the fundamental parameters that the model must take into account. The first parameter is popular sovereignty and the need to implement it at the global level while maintaining it at the state level. The second parameter is the nature of the globalization process as a movement away from the states in the direction of the global level. These two parameters work as two axes defining a plane within which to try and identify the global constituent power. This process allows us to step back and distance ourselves from specific wording, the interpretation of which may always be disputed. It has a pedagogical function as well as clarifies the reasoning. It also helps situate criticism of the composite global constituent power model, whether it is aimed at the assumptions or at the implementation of the assumptions, thereby allowing a more fruitful debate.

The second set of limits comes from the pointillist nature of global constitutionalism. Many of the emerging theories of global constituent power identify states as global co-constituent power. However, because of the pointillist nature of global constitutionalism, the global constituent power is called on to act on a regular basis, which raises the question of the effectiveness of constitutional constraints on states as constituted powers when they are as likely to often act as constituent power as well. There might be confusion regarding the capacity in which they act in a given case. On the contrary, in the composite global constituent power model, states never hold the

constituent power. They at best exercise the constituent power as mediators, in which case constituent power boosters are there to pressure states into acting according to the will of the actual constituent power. Another issue that flows from the pointillist nature of global constitutionalism is when and how the global constituent power is created. In and of itself, the composite global constituent power model does not weigh in on this issue. It is compatible with both the view that the constituent power predates the constituting act and the view that the constituent power results from the constituting act. However, the pointillist nature of global constitutionalism, within which the composite global constituent power fits, would seem to suggest that the global constituent power predates the constituting act. If not, we would be in a situation where the constituent power never really gets constituted since the constitutionalization process happens over time, possibly perpetually.

The third type of limits stems from states acting as co-constituent power alongside individuals in several of the reviewed emerging theories of global constituent power, and the fact that the former retain power over the latter. In the composite global constituent power model, the issue does not arise with the same intensity, and possibly not at all, as states do not hold the global constituent power. The composite global constituent power model only completely removes states from the picture at the level of the global component. They may be mediators of the state component of the global constituent power, in which case the question of their power over individuals, the true

holders of the global constituent power, may come up. Here again the function of the constituent power boosters is to address this concern by requiring that states consult and follow the constituent power.

The fourth type of limit revolves around mediation of the global constituent power and asks whether the constituent power can ever be mediated or should always act unfettered. The composite global constituent power does not fully do away with this limit, though it tries to attenuate it by offering alternatives to mediation. If mediation is indeed the path taken, likely for practical reasons, the composite global constituent power model incorporates boosters as a way to ensure compliance with the will of the constituent power. According to the composite global constituent power model and its specificity requirement, boosters must occur at a time that is close to the constitutional dot-making moment to ensure that the connection between the constituent power and the mediator is tight.

Overall, the composite global constituent power model represents a further step in the direction of a global constituent power theory. Its commitment to popular sovereignty and the reassignment of states from co-constituent power to mediators at most addresses and alleviates most concerns. I now turn to limits related to my choice of global constitutionalism as international law theory.

Section 2: Carrying the burden of constitutionalism and global constitutionalism's faults

So far, I have described global constitutionalism in very positive terms, arguing that global constitutionalism has a lot to contribute to the efforts to increase the legitimacy of international law. Nevertheless, we shall not be fooled by an overly rosy picture of global constitutionalism. It has its detractors, who raise many negative points associated with global constitutionalism. These are in addition to the weaknesses of constitutionalism that naturally carry over into global constitutionalism.

In the latter category, we find the many theoretical puzzles raised by the notion of constituent power. Some would argue that the notion of constituent power is plagued by so many internal contradictions as to be rendered useless, or worse, damaging at the international level. One such contradiction that has not been mentioned yet relates to the constituent power's consent. To be thought as the maker of the constitution, the constituent power has to consent. This proposition is far more complex than it sounds. As one scholar eloquently said, “[t]o accept without reflection the legitimating function of consent and to substitute the myth of social contract for that of divine rights of kings is to reject both the value of reason and the necessity of offering a reasoned explanation for a political system.”²⁴⁵

²⁴⁵ W. F. Murphy, *Consent and Constitutional Change*, 127-145, 127 in HUMAN RIGHTS AND CONSTITUTIONAL LAW (James O'Reilly ed. 1992).

Two obvious limitations come to shake the simple logic of the consent of the governed. On the one hand, and not even going into details about the quality of the consent (i.e. free, informed etc.), consent seems apt at legitimating the constitution only if it is unanimous. In practice, unanimous consent seems impossible to obtain (assuming people are free not to consent). Can the consent of less than all of the governed make the constitution legitimate? How can a constitution be legitimate to those who have not consented to it? “Why should the losers in the constitutional strife accept the outcome as the will of “We the People” that incorporates their will as well as the will of their winning rivals despite these alienating conditions?” asks Tremblay.²⁴⁶ What about those who have abstained? Can they be said to have consented? Hardly so. As Barnett puts it, a system in which a less than unanimous consent could legitimize the constitution could be said to play by the following rules: “‘Heads’ you consent, ‘tails’ you consent, ‘didn’t flip the coin,’ guess what? You consent as well.”²⁴⁷ For Barnett, “[t]his is simply not consent.”²⁴⁸

The dead hand argument²⁴⁹ underlines another fundamental flaw of the consent theory. How can consent at time *t* bind later generations? Jefferson proposed that each

²⁴⁶ T. Inoue, *Constitutional Legitimacy Reconsidered: Beyond the Myth of Consensus*, 3 LEGISPRUDENCE (2009), 19, 25.

²⁴⁷ R. E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2013), 16.

²⁴⁸ *Id.* at 16.

²⁴⁹ A. M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. (2008), 606, 613.

generation consent anew to the US constitution.²⁵⁰ In addition to being quite impractical, it would not have solved the issue. There would still be people, falling in between two generations for instance, who would not have been given an opportunity to consent. It has been argued that the deadhand is the best way to save the sovereign from itself, its own madness, by constraining its later actions. But, as Tremblay points out, “it is not fair to characterize the constitution-making generation and subsequent generations who are bound by the constitution made by the former as rational and irrational moments of the same agent.”²⁵¹

To cope with these conflicts, arguments have been made in favor of a less literal and more relaxed definition of consent. For instance, the receipt of benefits of a particular legal system has also been seen as approximating consent under the principle of fair play.²⁵² So has continuous residency within the jurisdiction, based on the rational that if you didn’t like it, you would have left it. This strategy has not convinced all authors.²⁵³ Some have displaced the burden of legitimation from the mythical consent to compliance with certain values. For instance, Barnett explained that “if a constitution contains adequate procedures to assure that laws imposed on non-consenting persons

²⁵⁰ T. Jefferson, *Letter from Thomas Jefferson to James Madison*, 6 September 1789, <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> (last visited on 4 November 2015).

²⁵¹ T. Inoue, *Constitutional Legitimacy Reconsidered: Beyond the Myth of Consensus*, 3 LEGISPRUDENCE (2009), 19, 24.

²⁵² R. E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2013), 25.

²⁵³ *Id.* at 17-19.

are just (or not unjust), it can be legitimate even if not consented to unanimously.”²⁵⁴ His vision of constitutional legitimacy is procedural in nature – the legitimacy of the constitution depends on how procedures are designed - but presupposes the adoption of a theory of justice by which to evaluate the legitimacy of the constitution.²⁵⁵ Similarly, in Murphy’s view, consent is a manifestation of human dignity, which is the ultimate legitimator.²⁵⁶ Only a political system that protects and fosters human dignity will be legitimate. Human dignity, “based on a capacity to reason, a need for moral autonomy, and an ability to make morally binding commitments,”²⁵⁷ thus requires that people be given the opportunity to consent.²⁵⁸

This criticism is powerful as it goes to the heart of my theory of global constitutionalism. Regarding the intra-generational conflict, the composite global constituent power model requires unanimity between both domestic and state components but that does not mean that unanimity is required within each component. As far as the intergenerational conflict is concerned, it also remains as it is hard to conceive of a functioning constituent power that would constantly be unanimously consenting to the same thing over and over again to ensure that all people living under constitutional norms have agreed to it. While global constitutionalism follows a pointillist pattern and

²⁵⁴ *Id.* at 3.

²⁵⁵ *Id.* at 3.

²⁵⁶ W. F. Murphy, *Consent and Constitutional Change*, 127-145, in *HUMAN RIGHTS AND CONSTITUTIONAL LAW* (James O’Reilly ed. 1992), 143.

²⁵⁷ *Id.* at 142.

²⁵⁸ *Id.* at 143.

the global constituent power will be called on to act on a regular basis, it does not mean that it will be asked to consent to the same issue again and again but rather that it will be asked to consent on many different issues. That may at least contribute to the involvement of each generation to the global constitutional project and may help individuals feel committed to the overarching process.

For those who do not reject the notion of constituent power as a matter of principle, the absence of a global demos constitutes a sizeable issue. The idea of a global constituent power, or at least the possibility of a constituent power beyond the state, requires that a corresponding people exists. No demos, no constituent power, the argument goes. This kind of reasoning can be criticized as it assumes a very narrow definition of demos. The no demos argument transposes domestic solutions to the international realm. The global demos would be in all respects the same – including the degree of cohesion - as the domestic demos on a bigger scale. However, the question whether there is a global demos is far from being settled in literature. List and Koenig-Archibugi note that there is not a single definition for global demos.²⁵⁹ A demos could be defined as a group of people affected by a certain issue, or sharing certain traits, or as capable of forming a general will. Depending on how one defines a global demos, one may very well conclude that there is indeed a global demos, or that there will soon

²⁵⁹ C. List et al., *Can there be a global demos? An agency-base approach*, 38 PHIL. & PUB. AFFAIRS (2010), 76, 77.

be, or that there might be, or that it is impossible to ever be. There are many authors, which List and Koenig-Archibugi call the “optimists” or possibilists,” who do believe that a global demos exists, even if in embryonic form.²⁶⁰ As we saw in Chapter 5, the global constituent power is called on to decide on narrower issues than the domestic constituent powers. This may justify a less cohesive, less intense constituent power than at the domestic level. The composite global constituent power in its global component embraces the possibility of a global people. In internet governance, physical location does not carry exactly the same weight as when it comes to internet matters. Internet users may share similar experiences wherever they are in the world. As explained in Chapter 1, the internet is borders blind and has fostered communication across nations, and as a result the sense of closeness and shared destiny among people. We often hear the terms “netizen” or information society, which convey the idea that a group of people has appeared that does not define itself by its relationship with states but by its relationships to the internet. It thus does not seem unreasonable to side with those who believe that a global demos may exist. The purpose here is not to declare the notion of constituent power flawless and unimpeachable. It is simply to offer the global constituent power as a possible approach to increase legitimacy in global governance. Constitutionalism without a constituent power does not allow for the democratic determination of what the content of the constitutional norms should be.

²⁶⁰ *Id.* at 78.

Most attacks on global constitutionalism, however, have tended not to focus on the constituent power. This is unsurprising as global constitutionalism has positioned itself more as an overarching system of rules that can bring order in an otherwise chaotic world than as a theory of legitimacy based on consent of the governed. The most common criticisms are that global constitutionalism would lead to hegemony, less diversity, and a lack of accountability.²⁶¹ We can see here the specter of a world government controlled by a happy few imposing their laws onto the whole of humankind, regardless of their specificities or wishes. Because the nation-state is seen as the only guarantor of freedom, a world government can only mean the end of freedom. This concern may be dismissed easily, as the vast majority of global constitutionalists do not advocate for a global government. Global constitutionalism should certainly not be reduced to the institution of a world government. A global constituent power should not be equated with a single world government, as the composite global constituent power model shows.

Another serious attack has to do with constitutionalism's image, its aura. It is often claimed that having recourse to constitutional language gives an air of respectability to processes beyond the state that might not actually deserve such positive labels, almost as if our subconscious automatically associated constitutionalism with legitimacy and

²⁶¹ D. Johnston, *World Constitutionalism in the Theory of International Law*, 3-29, 19-20 in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (McDonald et al. eds. 2005).

authority.²⁶² Schwobel warns against the self-legitimation danger, writing that “[t]he rhetoric of global constitutionalism could be (mis)used to award legitimacy to global constitutional ideas themselves. The description of cooperation, the force of the law that is believed to exist despite violations, and other constitutionalist parlance can be viewed as the attempt of advocates of global constitutionalism to bring about what they describe as already existing.”²⁶³ Here again insisting on the requirement that the governed consent to constitutional rules should alleviate these concerns.

Section 3: Significant implementation difficulties

Implementation difficulties are as important as theoretical limits. For the composite global constituent power model to work, practical hurdles at both the domestic and global levels will have to be overcome.

A. State component

When it comes to the exercise of the state component of the global constituent power, a challenge will consist in ensuring that the state component is aware of and engaged in the global constitutional dot-making. The modes of exercise of the state component described above rely heavily on governments. Indeed, referenda and elections are usually initiated by governmental institutions. Even when states act as agent, states are also in a leading position, despite the constituent power boosters. As a result, it is of

²⁶² A. Peters, *The Merits of Global Constitutionalism*, 16 Ind. J. Global Legal Stud. (2009), 397, 400.

²⁶³ C. Schwobel, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (2011), 103.

paramount importance that governments accurately characterize the decisions at stake as global constitutional and act accordingly by soliciting the state component's will. Since, as explained above, the exercise of the state component is not bound by the domestic constitution, we can think of ways in which this hurdle may be partly lifted. It could be decided that citizens could trigger the process themselves, including by collecting a certain number of signatures, with the government being bound to follow through. We must recognize that the global constitutional nature of a decision might not be easy to ascertain.

B. Global component

The obvious difficulty in the exercise of the global component of the composite global constituent power is the scale. Organizing anything on a global scale is bound to be a challenge. The challenges are of two types: firstly, logistical difficulties, in which I would include the organization of the vote (in case of a vote, i.e. referendum or election); establishing rules governing the voting process, election finance, compliance with the rules... E-voting might alleviate some of these issues, including the actual logistics of organizing voting. However, that would require each state to ensure that all its citizens have access to the internet to vote. Reliance on non-state actors might be plagued by fewer issues. For instance, organizing and funding the campaign would not be the responsibility of some global entity but shared among all non-state actors. However, this leads to another issue, which is the inevitable inequality among non-state actors,

and the likely underrepresentation of certain groups. Participation into the decision-making process could be remote, though it is hard to believe that remote participation is as good as in-person participation.

The second type of challenge consists in mobilizing people. ICANN's experience is telling in that respect. Indeed, at the very beginning of its existence, ICANN had briefly experimented with global elections. The experience turned out to be a failure, not so much for logistical reasons, but mostly for a lack of widespread popular engagement. We must remember that the digital divide is real and that a large portion of the world population has not used the internet and among those who are internet users, an even smaller group is interested in internet issues to the point of getting informed and exercising their prerogatives. A similar response might be expected even on non-internet related topics. Participation rates in regular domestic elections are relatively low. To expect a better rates of participation for global issues would require a massive effort at the local level. Once again, this could be done by non-state actors in the case of mediation, or by states in the case of unfettered direct action and special representation.

The composite global constituent power model by no means addresses all questions and ends all discussions. Rather it serves as a basis for new discussions, whether it would be about counterproposals or limits of the model. With the limits described in this chapter in mind, I now apply the principles regarding the identity of the composite

global constituent power to internet governance and ask whether multistakeholderism may be considered as an iteration of the global constituent power.

CHAPTER 7: MULTISTAKEHOLDERISM AS A COMPOSITE GLOBAL CONSTITUENT POWER

Chapter 7 brings together global constitutionalism and internet governance by applying the composite global constituent power model to multistakeholderism. In particular, we first ask the conditions under which multistakeholderism may be legitimized by the composite global constituent power model. This accomplishes two things: it provides legitimacy to multistakeholderism and helps substantiate it (Section 1). We then proceed to look at ICANN's gTLD program, a global constitutional dot in internet governance, and offer suggestions on how to conform it to global constitutionalism (Section 2).

Section 1: Legitimizing equal multistakeholderism

In this section, I shall explain how the composite global constituent power model helps define each stakeholder's role and promotes equality among them.

A. A newfound role for each stakeholder

Approaching internet governance, and in particular multistakeholderism, via the global constituent power angle, firmly places individuals at the center. The WSIS Outcome Documents support this approach as they underline the need to build a “people-centered” information society as the main goal.²⁶⁴

²⁶⁴ World Summit on the Information Society, *Geneva Declaration of Principles*, (WSIS-03/GENEVA/DOC/4-E) (2003), http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf (last visited on 5 November 2016).

For memory, the composite global constituent power model's main features are as follows:

- 1) decision-making belongs to individuals in two capacities, as members of the state component and members of the global component;
- 2) both the state and global components must consent to global constitutional decision-making moments;
- 3) The state component is made up of the individuals within the jurisdiction of a state;
- 4) states do not make decisions – they may only serve as agents of the state component, in which case there must be mechanisms to ensure that they stay within the bounds of their role and implement the will of the state component;
- 5) the global component is completely disassociated from states: it comprises all the individuals in the world;
- 6) non-state actors, understood in the most inclusive way, may act as mediators of the global component.

How does multistakeholderism fit in, if at all? Each stakeholder, namely states, civil society and the private sector, may be found legitimate under certain conditions under the composite global constituent power model. The underlying assumption is that the nature of the contemplated decision(s) is of a global constitutional nature. With respect to internet governance, this would include decisions impacting rights and freedoms, or

allocating power to regulate certain global aspects of the internet. Let us review what could be the role of each stakeholder under the composite global constituent power model.

States

States may only be involved in the exercise of the global constituent power as mediators of the state component. Their participation in the making of global constitutional dots is guided by their respective domestic component that keeps states accountable through constituent power boosters. States cannot simply appoint government officials to negotiate and participate in talks, the way they would at any intergovernmental conference. The composite global constituent power model forces a shift in states' perception and understanding of themselves.

Civil society and private sector

Under certain conditions, these two categories, though different in many respects, including the nature of their aspirations and their structure, could be considered together as the mediators of the global component. One does not go without the other. One does not prevail over the other. In the past, civil society has had a more difficult time than the private sector in establishing its role in internet governance. The private sector was indeed de facto an active participant in internet governance as we have seen in Chapter 1. Because there is no procedure or rule structuring the mediation of the global component, there is a risk that civil society might be overshadowed by the private

sector. As we have said above in Chapter 6, the informality of the procedure may lead to the underrepresentation of certain groups. However, this informality is required for the diversity of opinions to be reflected during deliberation and decision-making.

To fulfill their role as mediators of the global component, civil society and the private sector must be fully engaged in the deliberations leading up to the constitutional dot-making as well as in the constitutional dot-making itself. There should be no gatekeepers restricting participation in this process. Some rules overseeing the deliberations and decision-making cannot be dispensed with. They would need to be as neutral as possible so as not to comparatively affect some groups more than others.

B. A newfound balance among stakeholders

As we have explained above, both the state and global components must consent. This means that states (as mediators) on the one hand and civil society and the private sector on the other hand must arrive at a consensual decision. In other words, the composite global constituent power model supports equal multistakeholderism, a brand of multistakeholderism that places all stakeholders on an equal footing. States may not proceed without both civil society and the private sector being on board (as was hoped for at the WCIT in Dubai). States and the private sector may not proceed without civil society on board (as was the case with the e-G8 or the OECD principles).

This contradicts the usual division of labor in internet governance as captured by the “in their respective role” phrase. The WSIS Outcome Documents had tried to assign

specific roles to states, civil society and the private sector. Though it hardly was a workable allocation of power, it conveyed the message that civil society or the private sector were not to be involved generally in internet governance. Their involvement was to be specific. The composite global constituent power model says otherwise. Civil society should not be involved only in community-building initiatives, the private sector should not only deal with technical issues, leaving all the rest to states. All stakeholders are involved in everything they see fit since they are mediators of those who are ultimately in charge of making decisions – that is to say, individuals, whether through the state component or through the global component. That is not to say, however, that the allocation of roles found in the WSIS Outcome Documents is useless. It could indicate a possible allocation of powers among constituted powers.

Conforming multistakeholderism to the requirements of the global constituent power model may in practice be difficult to obtain. Substantial changes are required both at the domestic and global levels. However, these parameters could be useful as targets to tend to. We should also not forget that multistakeholderism is not the only way to give life to the composite global constituent power model. I shall now examine ICANN's gTLD program, which provides a good case study for the implementation of the teachings of the composite global constituent power model.

Section 2: Thoughts on ICANN's gTLD program

We shall see that ICANN's gTLD program may be analyzed as a potential global constitutional dot and that the composite global constituent power model is a useful tool to increase the legitimacy of this rather unprecedented initiative by ICANN.

A. A bit of background on ICANN and its gTLD program

As we have explained above in Chapter 1, ICANN is a California based nonprofit corporation whose task is to perform the so-called IANA functions “on behalf of the global Internet community.”²⁶⁵ These functions have been delegated to ICANN by the NTIA pursuant to a contract that expired in September 2016. This contract was not renewed as the NTIA has relinquished all oversight power over it, leaving ICANN fully in charge.²⁶⁶ There are three main IANA functions, namely (a) coordinating the assignment of protocol parameters; (b) allocating internet's unique identifiers (including IP addresses) and (c) managing the domain name system (“DNS”). It is this last function that will get our attention. Each device connected to the internet (for instance smart phones, tablets or computers) is identified by a unique IP address that takes the form of a long series of numbers. As it would be extremely inconvenient to have to memorize numeric addresses, the DNS allows a series of letters, the domain name, to

²⁶⁵ ICANN, *An introduction to the Internet Assigned Numbers Authority (IANA) Functions* (December 2015), 4, <https://www.icann.org/en/system/files/files/iana-functions-18dec15-en.pdf> (last visited on 3 November 2016).

²⁶⁶ L. E. Strickling, *Updates on the IANA Transition*, NATIONAL TELECOMMUNICATIONS AND INFORMATION AGENCY (16 August 2016), <https://www.ntia.doc.gov/blog/2016/update-iana-transition> (last visited on 25 August 2016).

be used instead of the IP address. Obviously these identifiers, IP addresses and domain names, must remain unique so computers know where to find each other. Hence the need for the centralized management of domain names that was entrusted to ICANN. Responsibilities includes making decisions on requests for new top-level domain names, whether country-code top-level domain names, such as “.fr” or “.in,” or generic top-level domain names (“gTLDs”), such as “.com.” Until recently, only a very few gTLDs existed but ICANN has introduced a new gTLD program that enables the introduction of new gTLDs. The introduction of new gTLDs, which is to take place over several rounds, is meant to increase competition, diversity and choice in the domain name system and ICANN expects to receive hundreds of applications for new gTLDs every year.

B. The Limited Public Interest Objection as a potential global constitutional dot

The gTLD application process is governed by an applicant guidebook that is meant to add predictability and clarity to the process. Of interest here is the fact that the applicant guidebook provides for a third party right to object to the introduction of gTLDs that are “contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.”²⁶⁷ Whether this Limited Public Interest Objection, as it is called, should be granted is to be determined by a panel of

²⁶⁷ ICANN, *New gTLD Applicant Guidebook*, Sections 3.2.1. and 3.5.3 (4 June 2012), [file:///Users/anirikhchakrabarti/Downloads/guidebook-full-04jun12-en%20\(2\).pdf](file:///Users/anirikhchakrabarti/Downloads/guidebook-full-04jun12-en%20(2).pdf) (last visited on 3 November 2016).

international arbitrators in accordance with the procedural rules of the International Chamber of Commerce in Paris.²⁶⁸ The decisions of the panel bind ICANN.²⁶⁹ ICANN also appoints an independent objector who “acts solely in the best interests of the public who use the global Internet.”²⁷⁰ The independent objector may file objections to “highly objectionable” gTLDs on specified grounds, including the Limited Public Interest Objection.²⁷¹

The goal of the Limited Public Interest Objection is to protect gTLD applicants’ freedom of speech, the underlying assumption being that the new gTLDs do constitute speech. The new gTLDs may be up to 63-character-long, using virtually any alphabet. A lot can be said in 63 characters. In addition to the gTLDs’ inner ‘expressiveness,’ gTLDs may also be viewed as proxy for the content that could be hosted under such gTLDs. It is sufficient to think of an example like “.isis” to see the merits of this approach.

Earlier, we had described global constitutional dots as having two components, a substantive one and a procedural one. Substantively, the dot must relate either to the management of constituted powers (for instance allocating power or on the contrary, constraining power) or to the introduction of rights and freedoms for the enjoyment of

²⁶⁸ *Id.* at Section 3.2.3.

²⁶⁹ *Id.* at Section 3.4.6.

²⁷⁰ *Id.* at Section 3.2.5.

²⁷¹ *Id.* at Section 3.2.5.

individuals. Procedurally, the dot must have been consented to by the global constituent power. Looking at the Limited Public Interest Objection, we can easily conclude that its substance is global constitutional. It is in essence a form of global speech regulation. In that respect, the Limited Public Interest Objection is quite unique.

ICANN had never before set out to regulate speech. Indeed, previous rounds of gTLD creations were not subject to similar rules. There were only few conditions to be met, mostly financial and technical in nature, the only legal requirement being a commitment to ICANN's top-level domain name policies and policy development process. The decisions were made in an ad hoc manner, unconstrained by any substantive rules. ICANN's gTLD program also differs from previous instances of regulation of speech by ICANN. As Nunziato underlined,²⁷² ICANN has been involved in speech regulation since its creation in two subtle and incidental ways. First of all, by prohibiting the anonymous registration of domain names, ICANN prevents internet users from engaging in anonymous or pseudonymous speech via their websites. Secondly, it has been shown that trademark owners successfully use, or arguably abuse, ICANN's dispute resolution mechanism for solving domain names disputes arising out of trademarks to prevent product or brand criticism, with a negative impact on freedom of speech. The speech regulation resulting from the Limited Public Interest Objection

²⁷² D. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L. J. (2003), 187, 202, 207-208.

is not incidental. On the contrary, the Limited Public Interest Objection is directly aimed at regulating speech by deciding what speech deserves protection and what speech does not.

The Limited Public Interest Objection is also unique in that there is no equivalent global adjudication system for freedom of speech. There have been notable efforts, most recently initiated by Switzerland with the support of prominent human rights lawyers, to create a world court for human rights that would include freedom of speech.²⁷³ The proposal was however met with criticisms and has not produced any concrete results.²⁷⁴ So far exist only at the supranational level regional courts, such as the European Court of Human Rights, that would have jurisdiction over freedom of speech disputes. There are many obstacles that render the global adjudication of freedom of speech unlikely. Among others, some common ground on what constitutes protected speech would be a necessary prerequisite and we are far from it. The Yahoo case²⁷⁵ that highlighted the

²⁷³ See e.g. M. Scheinin, *Towards a World Court of Human Rights*, Research Report within the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights (30 April 2009), <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/WorldCourtReport30April2009.pdf> (last visited on 23 January 2016); Swiss Initiative for the 60th Commemoration of the Anniversary of the UDHR, *Protecting Dignity: An Agenda for Human Rights* (2011), http://www.geneva-academy.ch/docs/publications/Panel-humanDignity_rapport2011.pdf (last visited on 3 November 2016).

²⁷⁴ See generally P. Alston, *Against a World Court for Human Rights* (23 October 2013), 28 ETHICS & INT'L AFFAIRS (2014), 197.

²⁷⁵ Tribunal de Grande Instance, *LICRA et UEJF v. Yahoo! Inc. et Yahoo Fr.*, T.G.I. Paris, May 22, 2000 (FRANCE).

divergence between the American and French approaches to freedom of speech is ample proof of it.

C. Global constitutional dot-making process under review

We have established that with the Limited Public Interest Objection, ICANN has added what is in substance a global constitutional dot to the internet governance canvas. Now the question becomes whether, from a procedural point of view, the dot-making complied with the composite global constituent power model. This is crucial as the Limited Public Interest Objection, with its ambitious global speech regulation, could easily appear as an illegitimate exercise of power by ICANN.

Beyond uneasiness with the wording of the Limited Public Interest Objection or with the adequacy of arbitration for dispute resolution, the fact that ICANN was able to introduce a global system of speech regulation denotes a formidable kind of power. To remarkable power should correspond remarkable legitimacy. However, in this case, the legitimacy of ICANN and its gTLD program is of a nontraditional kind. ICANN gets its authority over the DNS from a contract with the US government, the US government itself, owing its authority over the DNS from its historical role in the creation of the internet. While the US government, through the NTIA, had until recently retained some oversight power over ICANN, that would hardly seem sufficient – and not just because this oversight ceased as of October 1, 2016. It is nothing more

than a locally defined, derivative source of legitimacy that is not a match for ICANN's global speech regulation scheme.

Using the composite global constituent power model, we can evaluate whether ICANN's multistakeholder governance may provide much needed legitimacy to the Limited Public Interest Objection. ICANN has indeed been conceived from the beginning as a multistakeholder organization serving the global internet community.²⁷⁶ ICANN has a complex organizational chart that involves instituted groups representing many interests, with the ICANN board (the "Board") sitting at the top. The Board makes decisions on the basis of recommendations and advice from those groups and the general public. At every level, there is an effort to ensure "functional, geographic and cultural diversity,"²⁷⁷ and to involve "those entities most affected"²⁷⁸ by ICANN policies.

The Board. The Board consists of 16 directors, half being directly elected by the Supporting Organizations (see below) and the At-Large Advisory Committee ("ALAC"), half being selected by a nominating committee that is itself composed of members selected by the three Supporting Organizations, the ALAC, the IETF and

²⁷⁶ D. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. (2003), 187, 233-234 and 237.

²⁷⁷ ICANN, *Bylaws*, Article I(2)(4) (11 February 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last visited on 4 November 2016).

²⁷⁸ *Id.* at Article I, Section 2.7.

non-voting members.²⁷⁹ Directors must “in the aggregate display diversity in geography, culture, skills, experience, and perspective.”²⁸⁰

Instituted groups. There are two types of instituted groups:

- **Supporting Organizations:** There are three supporting organizations, which create policies within their field – IP address, ccTLDs and gTLDs. Their own membership must reflect the various groups affected by their policies (businesses, individuals etc.).²⁸¹
- **Advisory Committees:** There are several advisory committees, often dedicated to technical issues such as security. However, two Advisory Committees stand out for they enjoy special rights. First is the Governmental Advisory Committee (the “GAC”), through which governments participate in ICANN’s governance. According to Article XI, Section 2 (a) of ICANN’s bylaws, the GAC “should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”²⁸² The Board must explain the reasons why it chooses to disregard advice given by the GAC and allow time to

²⁷⁹ *Id.* at Article VI, Section 2 and Article VII, Section 2.

²⁸⁰ *Id.* at Article VI, Section 2 (2).

²⁸¹ *Id.* at Articles VIII-X.

²⁸² *Id.* at Article XI, Section 2 (1)(j).

try and find a mutually acceptable solution.²⁸³ If this proves impossible, the Board's opinion will prevail. The At-Large Advisory Committee represents individual internet users. It relies on, and is for the most part selected by, a pyramidal structure of local and regional at-large organizations. Among other roles, the ALAC gets to directly select one member of the Board.

²⁸³ *Id.* at Article XI, Section 2 (1)(j).

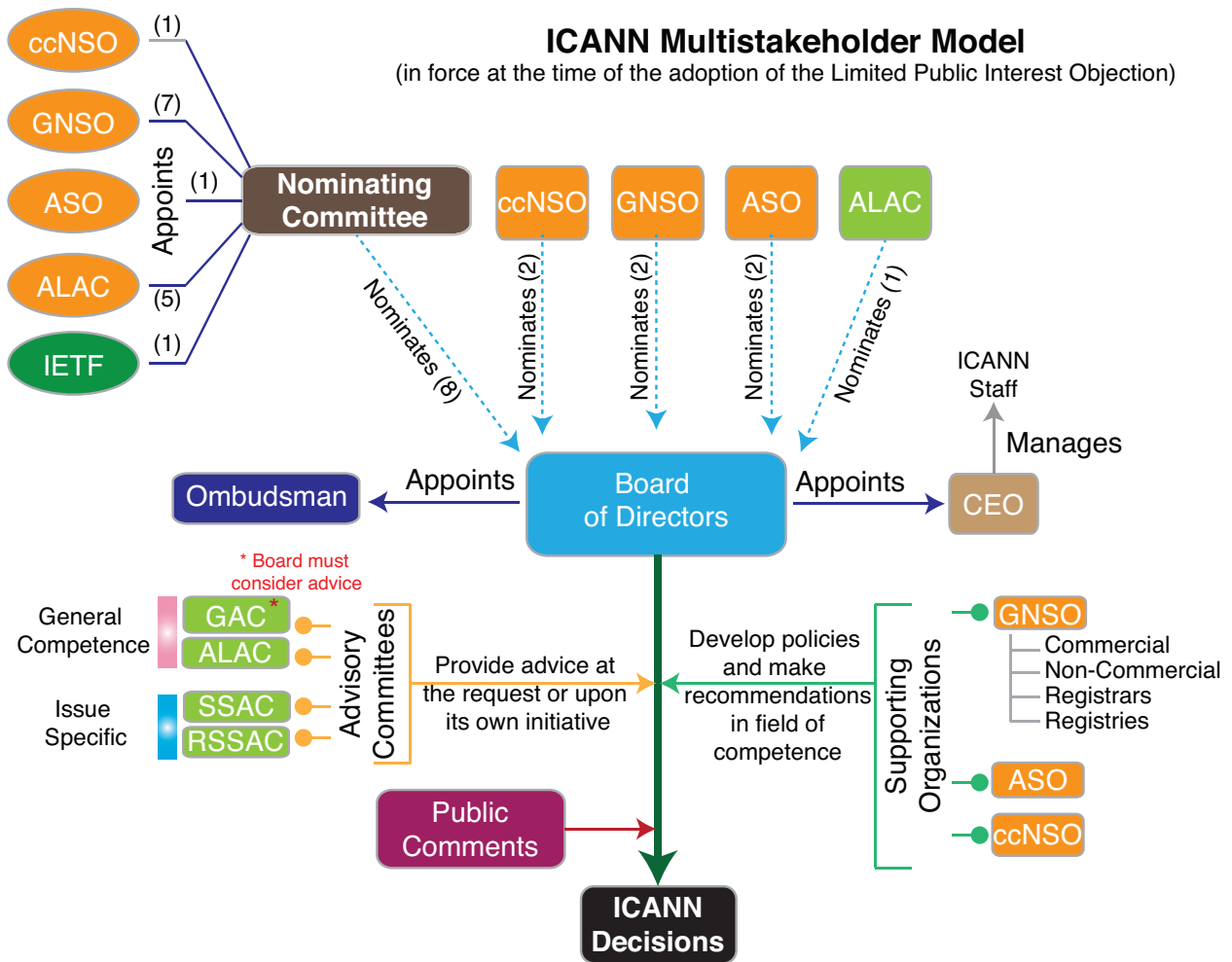


Figure 3: ICANN Multistakeholder model

The adoption of the applicant guidebook was the result of a lengthy multistep process involving the relevant Supporting Organization, namely the Generic Names Supporting Organization (“GNSO”). The GNSO comprises 4 constituencies – the commercial stakeholder group (i.e. business users, including ISPs), the non-commercial stakeholder group (i.e. individuals interested in and/or affected by gTLD policy, often represented by NGOs), and two groups that are directly participating in the operation of the DNS, the registries stakeholder group (who maintain registries of all domain names within a top level domain name) and the registrars stakeholder group (who provide registration services to individuals or businesses that wish to register a domain name) - and that came up with a list of policy recommendations, including the recommendation that the gTLD applicant’s freedom of speech should be protected. The ICANN board then adopted 19 such policy recommendations that were later on used as guidelines for the drafting of the applicant guidebook. The draft applicant guidebook was then posted on the ICANN website for public comment and was amended several times over the course of the following 3 years. As part of the process, the Board also met with the GAC over a period of three months to “promote joint understanding of the issues and arrive at an agreed-upon resolution of those differences wherever possible.”²⁸⁴ Almost all of the changes requested by the GAC were incorporated into the applicant

²⁸⁴ ICANN, *New Generic Top Level Domain Name, Board/GAC Consultations*, <https://newgtlds.icann.org/en/about/historical-documentation/board-gac-consultations> (last visited on 21 August 2016).

guidebook. Tensions between the Board and the GAC rose when it became clear that the Board would not incorporate a couple of trademark-related modifications that the GAC demanded. The Board finally adopted the applicant guidebook in June 2011.²⁸⁵ From the angle of the composite global constituent power model, the multistakeholder model that is currently in place and was adopted for the introduction of the Limited Public Interest Objection at ICANN is lacking.

The drafting of the Limited Public Interest Objection involved many actors: the GNSO, the GAC and the Board, as well as the general public. This broad participation seems consonant with the composite global constituent power model. As we have said earlier, an inclusive drafting process should make consent of all parties much easier. The issue here, however, is that the decision-making is far from inclusive.

Under the current bylaws, the Board is the ultimate decision-maker. It can even change the bylaws on its own.²⁸⁶ As we have seen, a slight concession is that it must give full consideration to government advice, make every effort to find a compromise and explain the reasons if that turns out to be impossible. If the Board has rarely relied on its power to overcome the GAC, it remains that the institutional set-up grants the Board all powers. In the case of the applicant guidebook, we have seen that the Board had

²⁸⁵ ICANN, *Board Resolution*, (20 June 2011), available at <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en> (last visited on 21 August 2016).

²⁸⁶ ICANN, *Bylaws*, Article XIX (11 February 2016), <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last visited on 4 November 2016).

scheduled many meetings over a three-month period to ensure GAC support, and indeed, GAC supported the wording of the Objection as it was adopted. Unresolved issues between the GAC and the Board did not relate to the Objection. We can conclude that, with respect to the Limited Public Interest Objection, the Board and the GAC consented. The GNSO or the general public were only involved in drafting. Their opinions were mere suggestions.

Does the consent by the Board and the GAC to the Limited Public Interest Objection suffice to comply with the composite global constituent power model? The short answer is that it falls short of representing both the state and global components. On the one hand, the GAC does not amount to the state component. The GAC is composed of governmental officials.²⁸⁷ They may be government employees, or elected representatives. However, the state component requires a tighter connection to the state component, which is created either through referendum, special representation, or through state agency supplemented by constituent power boosters. This is certainly not the case with the GAC. Government appointees to the GAC are usually diplomats or civil servants involved in telecommunication regulations. On the other hand, the Board cannot be approximated to the global component. The directors are currently selected by ALAC and the three supporting organizations. ALAC and the three supporting organizations may be viewed as an emanation of civil society and the private sector,

²⁸⁷ *Id.* at Article XI, Section 2(1)(e).

respectively. Thus the Board could potentially be seen as the mediator of the global component, were it not for two issues. Firstly, there is a disparity between the weight of each, civil society being mathematically entitled to only a fraction of the influence that the private sector enjoys. For instance, under the current bylaws, ALAC directly appoints only two directors while the three supporting organizations together directly select six of them. This inequality between civil society and the private sector is an issue I have pointed out earlier in Section 1 (B) above. Furthermore, the connection between the Board and the global component is not tight enough. If ALAC and the three supporting organizations select the Board, they have no direct connection once the Board is elected. In particular, they cannot remove a director from office. They may provide advice and make policy proposals. However, there is no obligation for the Board to consider the advice thus received, in contrast to what is required of the Board with respect to advice given by the GAC. As a result, the connection between the Board and the global component that would make the Board its mediator of the global component is missing.

However, the situation is going to evolve soon. The reform of ICANN's accountability mechanisms prompted by the IANA transition that came into force in October 2016 goes in the right direction. Indeed, under the new bylaws, the Board's powers are somewhat reduced. The Board will no longer be able to unilaterally change the most fundamental articles of the bylaws. In addition, the newly created Empowered

Community, which will have the legal form of an unincorporated association under California law and will count 5 Decisional Participants (the three Supporting Organizations, the ALAC and the GAC)²⁸⁸ will have enforcement power against the Board, including the power to remove some or all the members of the Board. These changes will somewhat shift the pendulum away from the Board in the direction of the internet community. A telling sign is that the article in the new bylaws related to the Empowered Community comes before the article related to the Board.²⁸⁹

This constitutes a definite improvement of the decision-making process at ICANN from the point of view of the composite global constituent power model. What more could be done? Turning the GAC into the state component of the global constituent power would require changes at the domestic level, rather than at the level of ICANN. Indeed, it is up to each government to modify the way their GAC representatives are selected. The government appointees could be replaced by specially elected representatives. Governments could also introduce constituent power boosters, for instance by submitting all ICANN business that amounts to a global constitutional dot for comments at the domestic level. Remains the civil society-private sector imbalance. That would require a further ICANN reform and is thus unlikely in the near future.

²⁸⁸ ICANN, *Bylaws*, Article 6(1)(a) (1 October 2016), <https://www.icann.org/resources/pages/governance/bylaws-en> (last visited on 5 November 2016).

²⁸⁹ *Id.* at Article 6(2).

CONCLUSION

In the introduction, I asked whether it was legitimate for multistakeholderism to eclipse traditional international law in the global governance of the internet, especially in view of its own legitimacy deficit. Who should get to consent to global internet governance? This was the question that I set out to answer in this dissertation.

I mobilized the tools of constitutionalism as it promises democratic legitimacy. Domestic constitutionalism relies on the notion of constituent power to secure the consent of the governed. I assumed that global constitutionalism would similarly revolve around a global constituent power. A nascent literature has indeed taken this path but has so far failed to offer a model for a global constituent power that would be replicable beyond the area of law in which it was devised – mostly EU law.

Such a model would have to meet two conditions. Firstly, globalization does not mean that state-level governance is a thing of the past. On the contrary, self-government in the era of globalization requires that individuals govern themselves in the constitutional sense both at the domestic level and the global level concomitantly. Secondly, the pointillist nature of global constitutionalization, which happens dots after dots, influences both the identity and the exercise the global constituent power. It prescribes the continued involvement of the state element of the global constituent power and alternative modes of participation that do not display the level of formalism of votes.

These conditions mandate the basic features of the composite global constituent power model:

- Individuals, to the exclusion of all other entities, are the holders of the constituent power.
- The composite global constituent power is made up of the same individuals that are packaged differently: along state borders (state component) and irrespective of state borders (global component).
- Both the consent of the domestic element and of the global element of the composite global constituent power are necessary.

Individuals may exercise their constituent power in various ways, more or less formal. The modes of participation have in common that they must allow for the active and specific participation of individuals.

[Implications for global internet governance](#)

Going back to the initial question of whether multistakeholderism is a legitimate form of governance, I concluded that the composite global constituent power model could support a specific form of multistakeholderism – equal multistakeholderism, with states acting as agents of the state component and the private sector and civil society as mediators of the global component of the global constituent power. The composite global constituent power model helps us go beyond the “necessary actors” rhetoric prevalent in internet governance when it comes to identifying legitimate actors. While

multistakeholderism often is presented as a considerable progressive achievement, it becomes clear that further modifications to the way internet governance is currently conducted must be implemented for multistakeholderism to comply with the global constituent power model and realize its full potential.

Scalability

The principles governing the definition of the global constituent power are adaptable at various levels beyond the nation-state. Whether the governance level is regional or global, the composition of the constituent power would follow the same principles. The continuity between each level of governing derives from the fact that in the end, the governed are the same: individuals. The composite global constituent power model may also be used in fields other than internet governance.

Virtuous circle

The implementation of the composite global constituent power model would trigger a virtuous circle in global governance. Indeed, by imposing the need to obtain the global constituent power's consent to constitutional dots, it indirectly encourages changes of behaviors in the pre-consent phases. Involving people whose consent you need as early in the process as possible is likely to ease the consenting phase.

International law

The legitimacy of multistakeholderism as a form of global internet governance was an important question in its own right. However, the fact that multistakeholderism was

used to ward off traditional international law made the issue even more critical. A global constitutional understanding of international law, however, reconciles both multistakeholderism and traditional international law. Multistakeholderism as a mode of exercise of the composite global constituent power would be one of the ways in which constitutional international law could be made, leaving the possibility of some non-constitutional international law being made by states acting as constituted powers.

If uncovering the legitimacy formula behind multistakeholderism is an important step towards greater legitimacy and clarity in global internet governance, there is still a long way to go. In particular, we should not forget that a significant portion of global internet governance is not done pursuant to (and not even approaching) the composite global constituent power model but by the private sector on its own. The private sector seems to be aware of its extraordinary power and its associated responsibility, as shown by initiatives such as the Global Network Initiative. The next step would be rethink these actors' role in the context of global constitutionalism, possibly granting them a status, and related rights and duties, commensurate with the actual power they have over our lives.

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